In the

United States Court of Appeals

For the Seventh Circuit

NATIONAL LEAD COMPANY,
Petitioner,

No. 10839 *vs.*

FEDERAL TRADE COMMISSION,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

No. 10840 *vs.*

FEDERAL TRADE COMMISSION,
Respondent.

THE EAGLE-PICHER COMPANY, ET AL.,
Petitioners,

No. 10841 *vs.*

FEDERAL TRADE COMMISSION,
Respondent.

ANACONDA COPPER MINING COMPANY, ET AL.,
Petitioners,

No. 10842 *vs.*

FEDERAL TRADE COMMISSION,
Respondent.

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1 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION; ss.

In the Matter of
National Lead Company, *et al.* } Docket No. 5253.

I, D. C. Daniel, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, in twenty-two parts, as follows:

Part 1—Pleadings—11-25-44 to 5-27-46, incl.
Part 2—Pleadings— 5-28-46 to 12-30-47, incl.
Part 3—Pleadings—12-31-47 to 5-24-48, incl.
Part 4—Pleadings— 5-25-48 to 2- 4-53, incl.
Part 5—Testimony—Pages 1 to 961, incl.
Part 6—Testimony—Pages 962 to 1931, incl.
Part 7—Testimony—Pages 1932 to 2783, incl.
Part 8—Testimony—Pages 2784 to 3630, incl.
Part 9—Testimony—Pages 3631 to 4398, incl.
Part 10—Exhibits—Decumentary—Commission 1 to 522, incl.
Part 11—Exhibits—Documentary—Commission 523 to 661, incl.
Part 12—Exhibits—Documentary—Commission 662 to 793, incl.
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Part 19—Exhibits—Documentary—Respondent 40 to 89, incl.

Part 20—Exhibits—Documentary—Respondent 90 to 126, incl.
Part 21—Exhibits—Documentary—Respondent 127 to 184, incl.
Part 22—Exhibits—Documentary—Respondent 185 to 309, incl.

and separate original physical exhibits:

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That this transcript is certified to the United States Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist dated January 12, 1953, issued by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 21st day of May, A. D. 1953.

D. C. Daniel,
Secretary.

(Seal)

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UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of National Lead Company, a corporation, Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation, Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation, The Sherwin-Williams Company, a corporation, and The Glidden Company, a corporation.	Docket No. 5253.

COMPLAINT

This complaint is filed to obtain relief against respondents because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of Section 5 of an act of Congress entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes", commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of Section 2(a) of an act of Congress entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes", commonly referred to as the "Clayton Act", as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A., sec. 13, as amended).

Count I.

The Charge Under the Federal Trade Commission Act.

Paragraph One: Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the au-

thority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its com-
3 plaint, stating its charges in that respect as follows:

Nature of Charges.

Paragraph Two: Respondent National Lead Company is charged in this Count I of the complaint with having monopolized and attempted to monopolize the interstate sale of white lead and with having acted unlawfully to secure a monopolistic control over the prices of white lead in the United States, and with having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of white lead in the United States. It and each of the other respondents are charged with using unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States.

Description of Respondents.

Paragraph Three: Each of the respondents is particularly named and described as follows: (a) National Lead Company, a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (sometimes hereinafter referred to merely as National). (b) Eagle-Picher Lead Company, an Ohio corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, parent corporation of respondent Eagle-Picher Sales Company. (c) Eagle-Picher Sales Company, a Delaware corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, the wholly-owned subsidiary of respondent Eagle-Picher Lead Company (sometimes hereinafter respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company both are referred to merely as Eagle-Picher). (d) Anaconda Copper Mining Company, a Montana corporation with its principal office located at 25 Broadway, New York, N. Y., parent corporation of respondent International Smelting & Refining Company

(sometimes hereinafter referred to merely as Anaconda). (e) International Smelting & Refining Company, a Montana corporation with its principal office at 25 Broadway, New York, N. Y., a wholly-owned subsidiary of respondent Anaconda Copper Mining Company (sometimes hereinafter referred to merely as International). (f) The Sherwin-Williams Company, an Ohio corporation, with principal offices at 101 Prospect Avenue Northwest, Cleveland, Ohio (sometimes hereinafter referred to merely as Sherwin-Williams). (g) The Glidden Company, an Ohio corporation with principal offices located at Union Trust Building, Cleveland, Ohio (sometimes hereinafter referred to merely as Glidden).

4 Definitions and Explanation of Terms.

Paragraph Four: Some of the terms hereinafter used are defined and explained as follows:

A. "White lead": White lead is a white, exceedingly fine powder known as basic lead carbonate. It is a chemical compound, analyzing, when carefully manufactured, about 69% carbonate of lead and 31% hydrate of lead. It is derived through processes of corroding metallic pig lead. White lead is frequently referred to in the lead and paint manufacturing industries, by dealers in paint and paint products and painters as "lead pigments", whether in powdered form or in the form of paste after a mixture with some linseed oil. In either of those forms it is usable by paint manufacturers and painters in preparing and producing white lead paint of the desired consistency by simply adding and thoroughly mixing therewith varying amounts of linseed oil and in some instances turpentine.

B. "Pig lead": Pig lead is a product derived from the smelting and refining of lead ore or lead "concentrates". The pig lead is secured after the smelting and refining has removed sulphur and other impurities from the lead ore and which are found in it as it is taken from the mines.

C. "Commerce": The term commerce as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Description and History of Industry and the Commerce of Respondents.

Paragraph Five: The respondents herein, either directly or indirectly through subsidiary corporations or operating divisions, are engaged in the manufacture, sale and distribution of white lead in commerce, and some of them, including respondents National, Eagle-Picher, Sherwin-Williams and Glidden, are also engaged in the use of white lead in their manufacture of white lead paint. The white lead that is thus produced is an important item in commerce between and among the several states. It is the principal item used in the manufacture of white lead paint. It is used in the manufacture of white lead paint by the principal paint manufacturers in the United States, as well as by painters throughout the country. The white lead paint thus produced is held in high esteem by painters and users as of the highest possible quality for application to exteriors of buildings, ships and other structures.

For a part of the period covered by this complaint the respondent Eagle-Picher Lead Company directly sold and distributed white lead in commerce, but it has also in directly sold and distributed white lead in commerce since the formation and incorporation in the State of Delaware of its wholly-owned subsidiary, respondent Eagle-Picher Sales Company, which now serves respondent Eagle-Picher Lead Company as a marketing medium for products of the parent company.

During a part of the period covered by this complaint white lead produced by respondent International Smelting & Refining Company was sold and distributed in commerce directly by respondent Anaconda Copper Mining Company through one of its operating divisions, namely, Anaconda Lead Products Company. However, about 1939, respondent Anaconda Copper Mining Company discontinued its sale and marketing of white lead in commerce through its operating division, the Anaconda Lead Products Company. It has since sold and distributed white lead in commerce through its Anaconda Sales Company, Pigments Division, and as the product if its wholly-owned subsidiary, International Smelting & Refining Company.

The production of the National Lead Company and the other producing respondents accounts for from 85% to 90% of all the white lead produced and sold in the United

States, with the production of the National accounting for approximately 60-65%, Eagle-Picher approximately 15%, and the other respondents for approximately 10% of the total. Therefore, as a practical matter, in the aggregate the producing respondents are the manufacturers and primary sellers to whom purchasers and users of white lead must turn for supplies of white lead. The production and distribution of pig lead, from which white lead is produced, is also concentrated in the hands of a few corporations, which include respondents National and Eagle-Picher.

Offenses Charged.

The Charges Generally Stated.

Paragraph Six: Respondent National Lead Company has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by monopolizing, attempting to monopolize and, acting to control the sale of white lead and the prices thereof in commerce. Respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company and The Glidden Company have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring and cooperating between and among themselves and with each other for the purpose and with the effect of restraining, hindering, suppressing and eliminating competition in price in the sale of white lead in commerce. Each of said respondents has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by engaging in and continuing
6 unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with sales and offers to sell white lead in commerce.

Charges Particularized.

Paragraph Seven: Respondent National Lead Company at the time of its inception, in 1891, embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of white lead in commerce. Pursuant to, in furtherance of, and in order

to effectuate the purposes of that plan and program, respondent National has engaged in, continued and is now doing and performing and carrying on the following acts, methods and practices.

A. Bought, merged and otherwise acquired control over or confederated with and secured the cooperation of other producers, buyers and sellers of pig lead destined for use in the manufacture of white lead. In furtherance of that part of its plan and program to monopolize the white lead industry and to secure control over the pricing of white lead in commerce:

(1) National, on or about December 7, 1891, succeeded to the control which had prior thereto been exercised by the National Lead Trust over the operations and activities of approximately sixteen previously independent firms engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, and thereafter continued its expansion by acquiring control over additional units in the lead industry.

(2) National, by 1904, became a party to cooperative action with industrial and financial leaders allied in common purposes and objectives, through common financial interests and otherwise. As a result of such cooperation and mutual assistance such leaders, including stockholders of respondent National, gained control of American Smelting & Refining Company (one of the largest corporations in the mining, smelting and refining of metals, including lead, in the United States, and in other parts of the world), American Linseed Oil Company (previously known as Linseed Oil Trust), National Lead Company (respondent National Lead Company herein, which was also previously known as National Lead Trust), and the United Lead Company, all of which proceeded, beginning in 1904, to operate in close harmony and cooperation. The
7 combined resources of said corporations included all lead smelting and refining plants in operation east of the Rocky Mountains and with sufficient capacity to smelt and refine the entire output of lead producing ores of all the mines east of the Rocky Mountains producing smelting ores. They also included all linseed oil producing plants in the United States which were then important factors in commerce.

(3) National, in 1906, acquired control of the United Lead Company which had previously been formed through

the acquisition of what had been numerous independent producers and refiners of lead.

(4) National, in 1907, acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.).

(5) National, shortly thereafter, acquired control of the business of Heath & Milligan Manufacturing Company of Chicago, the largest paint manufacturer in the West, but in 1919 transferred the control of that paint manufacturer to The Glidden Company, respondent herein.

(6) National, thereafter, acquired all of the stock of the Carter White Lead Company of Chicago and Omaha, the Matheson Lead Company, the River Smelting & Refining Company, Bass-Huerter Paint Company (then the second largest manufacturer of linseed paints and varnishes on the Pacific Coast), San Francisco, Calif., the National Lead Company of Argentina, and Hirst & Begley Company (an Illinois corporation engaged in the crushing of linseed oil which was subsequently reorganized into an operating branch of the National Lead Company).

(7) National has also secured control over a substantial part of the capital stock of respondent Eagle-Picher Lead Company. Up to February 1943, a still more substantial part of the Eagle-Picher Lead Company stock was held by one Edward J. Cornish, who had served as president of respondent National.

(8) National asserts and represents that the price of pig lead f.o.b. New York, N. Y., is the principal factor in its determination and fixing of its price for white lead, since pig lead is the principal item used in the manufacture of white lead.

(9) National through its acts, methods, practices and the relationships it maintains with American Smelting & Refining Company and others, through its employees,
8 agents, representatives, officers, directors and owners, exerts a monopolistic influence upon and is an important factor in the determination and quotation of the "market" prices on pig lead in the United States and upon the pig lead prices that it incorporates as an element of and factor in computing its prices of white lead. American Smelting & Refining Company holds a dominant position in the sale and production of pig lead in the United States, as well as in other parts of the world and quotes prices on pig lead in terms of cents per pound f.o.b. New York City. The prices thus quoted are "ac-

cepted" and treated as the "market" prices of pig lead not only by American Smelting & Refining Company but also by respondent National Lead Company and are used by both corporations as a basis for trading in that important product throughout the United States.

B. Respondent National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of white lead in the United States. In so doing, it has cooperated with and received assistance and cooperation from respondents Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, The Glidden Company, and the Lead Industries Association in which organization all respondents are members, in doing and performing the following acts and engaging in the following methods and practices:

(1) Agreed to adopt and have adopted and maintained a system of delivered price quotations which prevents reflection of any differences in the cost of delivery between the respective places of manufacture of respondent producers, the primary sellers and to the respective locations of intending purchasers of white lead;

(2) Agreed to adopt and have adopted and maintained a plan whereby the United States is divided into so-called zones whereby price offers made by the producing and primary selling respondents to all purchasers of a class throughout any one of such zones, regardless of location and the differences in freight rates from shipping point to destination, are matched, except that by prearrangement and understanding the offers made by respondents Glidden, Sherwin-Williams and International are permitted to be made and maintained at fixed differentials below the matched offers of respondents National and Eagle-Picher;

9 (3) Agreed to seek and secure and have sought and secured the advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents in fixing, adopting, publishing and using non-competitive terms and conditions of sale in connection with sales and offers to sell white lead in commerce;

(4) Exchanged directly and through the office of the Lead Industries Association and with the cooperation of officials of that Association price factors and information

concerning price factors expected by respondents to be used and which at times have been used by the primary sellers of white lead, including the respondents, in calculating, determining and announcing their offers to sell white lead in commerce;

(5) Agreed to adopt and have adopted, maintained and used terms and conditions of sale embodied in so-called "consignment" or "agency" agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers selling white lead and white lead paint from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such "consignment" or "agency" agreements;

(6) Agreed to fix, and have fixed and included in offers to sell, the prices, terms and conditions at which white lead is sold and offered for sale in commerce;

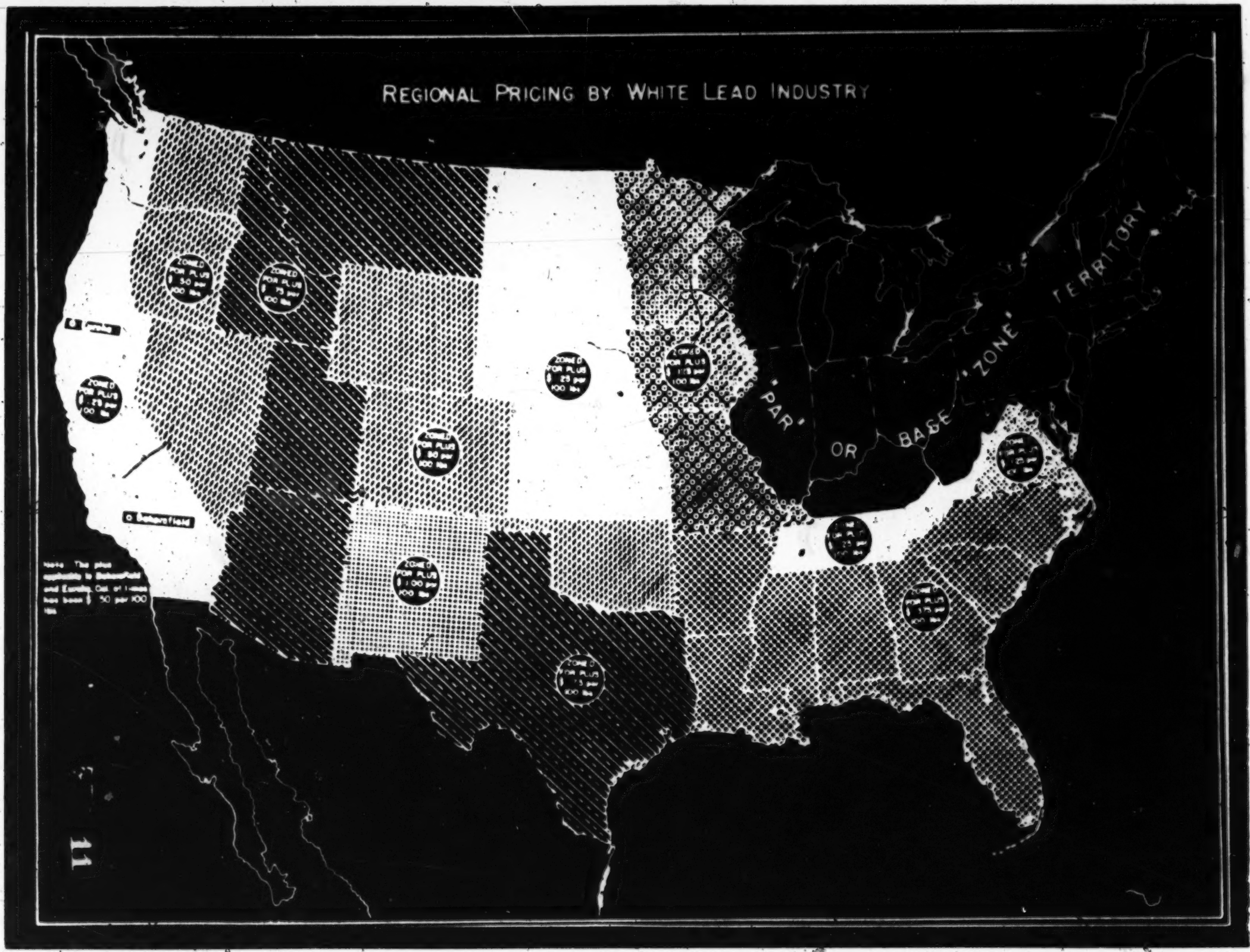
(7) Respondents National and Eagle-Picher have discussed and collaborated upon carefully considered ways and means to have written into Federal specifications provisions, designed by respondent Eagle-Picher to eliminate from bidding on Federal Government proposals to buy their industry's products, prospective bidders who were known to solicit Federal Government business through bids based upon specifications different from those applicable to the products of respondents National and Eagle-Picher; and

(8) Respondent National entered into contracts and understandings with E. I. du Pont de Nemours Company, Inc., a large paint manufacturer, for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead.

10 Paragraph Eight: Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, through its pursuit, adoption and use of a "Zone Delivered Pricing Method and Practice" as a part of what they hold out to have been an individual and independent course of action is contributing to and furthering the hindrance, lessening, suppression and elimination of competition in price in sales of and in offers to sell white lead in commerce as made by it and other sellers. Each said respondent thereby encourages, supports and furthers the plan and program of respond-

ent National Lead Company, described and set forth in Paragraph Seven of Count I of this complaint, to promote and maintain monopolistic and non-competitive prices and conditions in the sale of white lead.

A. As a part of said common course of action each such respondent uses the "Zone Delivered Pricing Method and Practice" in calculating, determining, making up, announcing, publishing, and distributing its price offers and prices on white lead to its respective customers in commerce. As a part of such method and practice the entire territory of continental United States has been and is now arbitrarily divided by each of such respondents into geographical "Zones", as shown by the map inserted herein immediately following and made a part hereof:


REGIONAL PRICING BY WHITE LEAD INDUSTRY
PAR
OR
BASE
ZONE
TERRITORY

12 B. Each such respondent has thus arbitrarily divided the United States into geographical "Zones" for the purpose of calculating, determining and announcing what the delivered cost shall be as paid by each of its prospective customers for white lead laid down at any given destination in the United States. Within the limits of the "Par" or "Base" zone, as shown on the map immediately preceding this page and which covers the Northeastern part of the country, each of the respondents quotes, in its offers, a base figure in terms of cents per pound as a delivered cost on white lead of a given quantity to all of its prospective purchasers of a given class at each of all of the many locations throughout such "Zone", disregarding differences in cost of delivery from its plant to the thousands of destinations within said zone. The figure thus quoted as a delivered cost is not reduced in offers to sell for delivery to customers at or near the factory door of any of the respondents but is the same figure applied in offers to sell the same quantity of white lead to other customers of such respondent located hundreds of miles away from its point of production in the said "Par" or "Base" Zone territory. Therefore, the said delivered cost figure does not reflect the substantial differences necessarily involved in the costs of sale and delivery to the customers of each of the respective respondents pursuant to the aforesaid offers. Figures quoted by each of the respondents to its customers in each of the other zones are the same at each and all of the destinations within the respective zones. They are arrived at by applying to destinations in what may be designated as Zone 2, an arbitrary mark-up of 12½¢ per hundred pounds above the level of the base figure used in the "Par" or "Base" Zone, and an additional arbitrary mark-up of 12½¢ per hundred pounds for each of the succeeding zones, so that the zones carrying the highest mark-ups of 50¢, 75¢ and $1.00 per 100 pounds are those covering the Rocky Mountain and other Western territory.

C. Each such respondent, when it makes, publishes and distributes "price cards" and other pricing information in printed, mimeographed, typed and other forms in their respective offers to sell white lead in commerce, uses several factors which, when arranged and computed in accordance with the instructions and directions included in such "price cards" and other so-called "pricing" in-

formation, causes to be presented to any given prospective purchaser of white lead of any class at any destination, Matched offers to sell over the names of respondent National and respondent Eagle-Picher in any given quantity and exactly Matched offers of National, Eagle-
13 Picher, Glidden, International and Sherwin-Williams for their respective sales quotations in small quantities. For example, in their quotations and offers to sell painters in lots of less than 500 pounds, they have exactly matched their offers as follows:

Name of Respondent	100# Keg	50# Keg	25# Keg	12½# Keg
National	$12.75	$6.50	$3.32	$1.69
Eagle-Picher	12.75	6.50	3.32	1.69
International	12.75	6.50	3.32	1.69
Sherwin-Williams	12.75	6.50	3.32	1.69
Glidden	12.75	6.50	3.32	1.69

D. Such precise and exact Matching of offers to sell by such respondents is inherently and necessarily involved when each of them uses the aforesaid "Zone Delivered Pricing Method and Practice" in calculating, making and announcing their quotations, and when in so doing each uses the same factors.

E. Inherently and necessarily involved in such precise and exact Matching of respondents' offers to sell white lead in commerce at an identical delivered cost to purchasers, whenever sales are effected thereby, is a discrimination against nearby customers and in favor of more distant customers. Such discrimination is reflected in terms of substantially different mill-net prices received by each of such respondents for white lead sold in commerce, with their respective customers located at or near the respective factory doors paying more to a given respondent for the same quantity and quality of white lead than customers of the same class located hundreds of miles distant from such respective factory doors. Such discrimination is not only inherent but an obviously necessary part of respondents' aforesaid method and practice of quoting the same figure as a delivered cost to a customer across the street as it quotes to its customer located hundreds of miles away for equal quantity and quality of white lead. That is because no freight charge is involved in any sale and delivery to the customer located across

the street, while a substantial part of the total delivered cost represents cost of delivery of such a heavy product when transported to the distantly located customer.

F. Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, has represented to its buyers and users of white lead and other paint products, to representatives of the Federal Government and to others that it and other sellers of
14 white lead are engaging in active and vigorous price competition, when such is not the fact. Each respondent for the purpose of promoting the belief that it and other sellers of white lead are in active and vigorous price competition represents that the "Zone Delivered Pricing Method and Practice" originated competitively, is maintained only through competition, and represents efforts of the respondents to compete with each other, when such are not the facts.

Paragraph Nine: Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, uses the aforesaid "Zone Delivered Pricing Method and Practice", described in Paragraph Eight of this Count I, for the purpose and with the effect of enabling respondents National and Eagle-Picher to more easily Match their offers to sell white lead in commerce to any given prospective purchaser and to maintain such Matched offers at a prearranged differential above the respective offers of respondents Glidden, Sherwin-Williams and International, and so that each of the latter named three respondents is enabled to maintain its offers to sell white lead in commerce to any given prospective purchaser at a prearranged differential below the aforesaid Matched offers of respondents National and Eagle-Picher.

Effects of Respondents' Actions.

Paragraph Ten: The inherent and necessary effects of the adoption, use and maintenance by each of the respondents National, Eagle-Picher, Anaconda, International, Sherwin-Williams, and Glidden, of their "Zone Delivered Pricing Method and Practice", as particularized in the allegations set forth in C of Paragraph Eight of this Count I, include the following, to wit:

A. The oppressive requirement that those who purchase and use white lead paint within the triangular ter-

ritory bounded by Kellogg and Wallace, Idaho; Denver and Leadville, Colorado; St. Joseph, Missouri, and St. Paul and Minneapolis, Minnesota, eventually must pay as a part of what is collected by the American Smelting & Refining Company, by the respondents herein, and by others the equivalent of freight or other delivery charges for transportation of pig lead from the producing centers in such territory to New York City and transportation back to or near such producing centers, although such lead was never actually transported to or from New York City, the amounts so charged and exacted being equal to more than 25% of all that is paid by such purchasers for the white lead used by them in paint applied on their homes and barns;

B. The oppressive requirement that other users in other extensive territories, including farmers, manufacturing industries and shipbuilders (who use large quantities of white lead in the painting of homes, barns, factories and ships) pay phantom and fictitious freight on lead from various points of origin to New York City and from there to various destinations throughout the United States, when, in truth and in fact, the white lead used by such consumers was never actually transported to or from New York;

C. An undue, unjust and unlawful regional discrimination by respondents against farmers, miners, manufacturing industries and other consumers in the North Central, Rocky Mountain and far Western states producing the raw materials for white lead and white lead paints and in favor of persons similarly engaged in the Northeastern and other states comprising respondents' "Par" or "Base" Zone;

D. Unfair and oppressive discrimination by respondents against the white lead purchasing and consuming public in large areas of the United States by depriving such purchasers of the natural advantage otherwise accruing to them from proximity to the factories of respondents and by compelling such purchasers to pay increases over what the net price of white lead to such purchasers would have been if fixed by competition among respondents, such increment in net prices to respondents approximating the advantages in freight rates to which such purchasers are entitled over purchasers remote from such factories. Such nearby purchasers are thereby compelled

to pay not only the actual freight rates on the products purchased by them respectively, but in effect also to pay portions of the cost of transportation of such products to other and more distant purchasers from the respective factories;

E. An undue concentration of white lead and white lead paint manufacturing industries in territories outside of and east of the Midwestern, Rocky Mountain and far Western states which produce the raw materials used in manufacturing said commodities;

F. A denial to prospective purchasers of white lead in commerce of the opportunity to bargain with any one of the respondents for a better price offer than made by the other respondents, thereby precluding purchasers from having any voice in determining the price they are to pay for the commodity;

G. A substantial lessening of competition among
16 respondents in all parts of the United States, through action of each respondent voluntarily and reciprocally surrendering and cancelling the inherent advantage it has over all competitors within the territory nearer freightwise to its factory than to the factory of a competitor, in consideration of a similar surrender and cancellation by other respondents;

H. The fixation and control through respondents' concurrent and parallel action of an arbitrary and substantial portion of the delivered cost of the product to any and every purchaser upon a basis having no relation to differences in cost of production, in selling costs, and in actual transportation cost, on particular sales. Such arbitrary result is accomplished notwithstanding substantial differences in the delivered cost to the respective respondents of raw materials shipped to them and of white lead shipped by them to their respective customers;

I. An unnecessary and undue enhancement in costs of materials used by industries directly engaged in producing supplies for use in the war effort of the United States;

J. An increase in the costs of paint as paid by users thereof and an encouragement of users to utilize for painting purposes products inferior to white lead paint;

K. The exaction of arbitrary financial payments in varying sums from a large number of customers for the sole purpose of reimbursing respondents for concessions voluntarily made to other customers and of thereby accomplish-

ing their unlawful purpose to destroy price competition in the sale of white lead and to create for themselves a monopoly therein and thereof;

L. The deception of buyers and users of paint into believing that respondents are engaging in active and vigorous price competition when in fact they are frustrating and suppressing it.

Conclusion.

Paragraph Eleven: The combinations, agreements and understandings of the respondents and their acts, prac-
17 tices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefit of competition; create discrimination against some buyers and users of white lead and white lead paint; have a dangerous tendency and capacity to restrain unreasonably commerce in said products; have actually hindered, frustrated, suppressed and eliminated competition in such products in commerce; and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Count II

The Charge Under the Clayton Act.

Paragraph One: Pursuant to the provisions of Section 2 of an act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes", commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of said act of Congress as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges in such respect as follows:

Nature of Charges.

Paragraph Two: The charges hereinafter contained in this Count II are that each of the respondents has been and is now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of white lead in commerce.

Description of Respondents. Definitions and Explanations of Terms. Description and History of Industry and the Commerce of Respondents.

Paragraphs Three To Five, Inclusive: As Paragraphs Three to Five, inclusive, of Count II, the Commission incorporates Paragraphs Three to Five, inclusive, of
18 Count I of this complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II, except the definition of the term "commerce." The term "commerce" as hereinafter used means "commerce" as defined and set forth in the Clayton Act.

Offenses Charged.

Paragraph Six: Since June 19, 1936, and while engaged as aforesaid in commerce among the several states of the United States and the District of Columbia, each of the respondents National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, has been and is now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, sold for use, consumption or resale within the several states of the United States and the District of Columbia, in that each of the respondents has been and is now systematically selling such commodities to many purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users, including purchasers competitively engaged with others who pay either the lower or the higher discriminatory prices.

Paragraph Seven: Each of the respondents uses a "Zone Delivered Pricing Method And Practice" in calculating, determining, making up, announcing, publishing, and distributing its offers to its respective customers to sell them white lead in commerce. As an incident to and

a part of such method and practice, the entire territory of continental United States has been and is now divided by each of such respondents for pricing purposes into geographical "Zones", as shown by the map appearing at page 10 of Count I of this complaint. By this allegation and by such reference said map is hereby inserted as a part of Count II hereof as fully as though it had been physically reproduced at this point.

19 Paragraph Eight: In using its aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, so quotes prices in its offers to sell that when it sells white lead in commerce in accordance and in connection therewith, the delivered cost on a specified quantity of white lead as paid by any one of its customers located at or near the factory door of such respondent, amounts to as much as the delivered cost on the same quantity of white lead as paid to such respondent by any one of other customers located hundreds of miles away in the same "Zone," although substantial differences are involved in the costs of delivery to such nearby customer and the more distantly located ones.

Paragraph Nine: Systematic discriminations in net prices against nearby customers and in favor of their more distantly located customers are inherent in the use of the aforesaid "Zone Delivered Pricing Method and Practice" when sales are effected and the buyers pay in accordance with quotations of Matched delivered costs as made by each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, to their respective customers.

Paragraph Ten: When sales are made to customers located at or near the borders of adjoining or contiguous "Zones" pursuant to the aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, charges, demands, accepts and receives higher prices from some purchasers than from other and competing purchasers in different zones and there is discrimination in the delivered costs of white lead to different purchasers by each of such respondents in addition to substantial differences in the mill net prices received by each of them.

Paragraph Eleven: Each of the respondents, National,

Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden has been and is now classifying its customers to receive from such respondents quantity, trade and regional discounts from quoted prices so that, by virtue of such classifications and action pursuant thereto by each such respondent, it charges, demands, accepts and receives higher prices in connection with sales of white lead in commerce from some of its customers than from other customers, even though said customers who pay such higher prices are competitively engaged with the customers who pay such lower prices.

Paragraph Twelve: Each of the respondents, National, Eagle-Picher, International, Sherwin-Williams and Glidden practices the aforesaid systematic discriminations in price, for the purpose and with the effect of enabling respondents National and Eagle-Picher to exactly Match their offers to sell white lead in commerce to any given prospective purchaser and to maintain such Matched offers at a prearranged differential above the respective offers of respondents Glidden, Sherwin-Williams and International, so that each of the latter named three respondents may maintain identical offers to sell white lead in commerce to any given prospective purchasers at a prearranged differential below the aforesaid Matched offers of respondents National and Eagle-Pitcher.

Effects of Price Discriminations Practiced By Respondents.

Paragraph Thirteen: The discriminations in price practiced by respondents, as particularized and alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, include the results and effects set forth as follows:

A. The allegations of the results and effects that are made and set out in subparagraphs A, B, C, D, E, F, G and H of Paragraph Ten of Count I hereof are hereby alleged as results and effects of respondents' price discriminations alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, and are hereby incorporated in this subparagraph of this Paragraph Thirteen of Count II to precisely the same extent as though each of said sugparagraphs A, B, C, D, E, F, G and H of Paragraph Ten of Count I were set forth in full and repeated verbatim as a part hereof;

B. A further effect of the aforesaid discriminations in price by said respondents may be substantially to lessen

competition in the sale and distribution of white lead between said respondents and their competitors, tend to create a monopoly in the line of commerce in which the respondents are engaged; and to injure, destroy and prevent competition between said respondents and their competitors in the sale and distribution of white lead;

21 C. Further effects of the aforesaid discriminations in price by said respondents may be substantially to lessen competition between the buyers of white lead receiving the lower discriminatory prices from respondents and other buyers competitively engaged with such favored buyers and who pay higher discriminatory prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy and prevent competition in the lines of commerce in which purchasers from respondents engaged as between the beneficiaries of said discriminatory prices and competing buyers who are required to pay the higher discriminatory prices.

Conclusion.

Paragraph Fourteen: Therefore the aforesaid discriminations in price by each of the respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A., sec. 13, as amended).

Wherefore, The Premises Considered, the Federal Trade Commission on this 25th day of November, A. D. 1944, issues its complaint against said respondents.

Notice.

Notice is hereby given you, National Lead Company, a corporation, Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation, Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation, The Sherwin-Williams Company, a corporation, and The Glidden Company, a corporation, respondents herein, that the 29th day of December, A. D. 1944, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission, at 45 Broadway, in the City of New York, N. Y., as the place, when and where a hearing will

be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to
22 file with the Commission an answer to the complaint.

If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondents admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief,

directed solely to that question, in accordance with Rule XXIII.

23 In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 25th day of November, A. D. 1944.

By the Commission.

Otis B. Johnson,
Secretary.

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137 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

• • (Caption—5253) • •

ANSWER OF ANACONDA COPPER MINING COMPANY.

(Stamp: Federal Trade Commission. Received Feb. 14, 1945. Secretary.)

The respondent Anaconda Copper Mining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the complaint herein:

Paragraph One: States that it is without knowledge of the reason for the belief of the Federal Trade Commission as alleged in Paragraph One of Count I of the Complaint that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

138 Paragraph Two: States, with respect to Paragraph Two of Count I of the Complaint, that it is without knowledge or information as to any facts forming the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of white lead and that it has acted unlawfully to secure a monopolistic control over the prices of white lead in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of white lead in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States.

Paragraph Three: With respect to the allegations of Paragraph Three of Count I of the Complaint, respondent admits that it is a Montana corporation, with an office at 25 Broadway, New York, N. Y., and that respondent International Smelting & Refining Company, a wholly owned subsidiary, is a Montana corporation with an office at 25 Broadway, New York, N. Y.

Respondent states that it is without knowledge or information as to the truth of the allegations contained
139 in Paragraph Three of Count I of the Complaint with respect to respondents other than itself and International Smelting & Refining Company.

Paragraph Four: With respect to Paragraph Four A of Count I of the Complaint, respondent admits that white lead is a white, exceedingly fine powder and is a basic lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. It admits that white lead principally contains lead carbonate and lead hydroxide, but avers that the percentage of each may vary slightly in the products of different manufacturers. White lead is one of several lead pigments. White lead is commonly referred to in its dry or powdered form by paint manufacturers as white lead or dry white lead, and is commonly referred to by painters in its paste form as lead-in-oil. It is in the form of a paste after mixing with linseed oil. Either in the form of powder or paste, it is usable by paint manufacturers in producing white lead paint, although lead paste is not commonly used by paint manufacturers. Paint manufacturers may produce white lead paint of the desired consistency by grinding dry white lead with varying amounts of linseed oil, turpentine, and other thinners and driers. White lead paint of the desired consistency may be made by the painter by mixing with lead paste varying amounts of linseed oil, turpentine, and other thinners and driers. Except as expressly admitted
140 by the foregoing admissions, respondent denies each

and every allegation contained in Paragraph Four A of Count I of the Complaint.

Respondent admits the allegations contained in Paragraph Four B of Count I of the Complaint.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Complaint.

Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Complaint, respondent admits:

That certain of respondents herein other than itself are engaged in the manufacture, sale and distribution of white lead in interstate commerce; that respondents National Lead Company and Eagle Picher Lead Company are engaged in the manufacture of white lead paint; that white lead is an important item of the commerce of respondent International Smelting & Refining Company between and among several States; that white lead is the principal item used in the manufacture of white lead paint; that white lead paint or paint produced from white lead-in-oil is held in high esteem by painters and users for application to exteriors of buildings and other structures. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture white lead paint.

141 It is without knowledge as to the period covered by the Complaint during which respondent Eagle Picher Lead Company directly sold and distributed white lead in commerce, or as to whether or when it sold such white lead in commerce indirectly through any subsidiary.

It denies that in any period covered by the Complaint, it either sold or distributed white lead, lead-in-oil, or white lead paint, or that Anaconda Lead Products Company was an operating division.

It admits that Anaconda Lead Products Company was a partly owned subsidiary and until in or about 1936 was engaged in the manufacture and sale of white lead.

It admits that respondent International Smelting & Refining Company has sold and distributed white lead, and that its subsidiary Anaconda Sales Company, Pigments Division, has sold white lead obtained from respondent International Smelting & Refining Company.

The total combined production of the producing respondents constitutes a very substantial proportion of all white lead produced and sold in the United States.

The production and sale of white lead and white lead-in-oil by respondent International Smelting & Refining Company constitutes a small proportion of the total produced and sold in the United States. Respondent is without
142 knowledge or information as to the exact proportions of the total produced and sold by the respondents other than International Smelting & Refining Company.

Other than as above referred to by admission, denial or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Complaint.

Paragraph Seven: Respondent states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Seven; Seven A; Seven A(1), (1), (2), (3), (4), (5), (6), (7), (8) and (9) of Count I of the Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B (1), (2) (3), (4), (5) and (6) of Count I of the Complaint, and Seven B (7) and (8) in so far as it is alleged that said Seven B (7) and (8) were done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7) and (8).

Paragraph Eight: Denies each and every allegation contained in Paragraph Eight and Eight A, B, C, D, E
143 and F of Count I of the Complaint, and alleges that respondent International Smelting & Refining Company quotes delivered prices for its products; that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates between International Smelting & Refining Company's mill and the customer's location in certain areas; that the variations in delivered prices quoted by International Smelting & Refining Company correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Complaint but are not identical therewith.

That the delivered prices quoted by respondent International Smelting & Refining Company are calculated in terms of differentials above a par price in par territory;

that the delivered prices quoted by respondent International Smelting & Refining Company are not the same as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is known to it; that prices quoted by respondent International Smelting & Refining Company and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of white lead who were at the same time offering and selling in the areas in which it does business competitive white lead products of similar quantities and grades; that respondent is in-
144 formed and believes that dealers purchasing respondent International Smelting & Refining Company's lead-in-oil frequently sell the same at the same price to their customers as they sell the lead-in-oil of other respondents; that certain customers located at or near respondent International Smelting & Refining Company's factory are charged the same price as certain customers located at a greater distance.

Paragraph Nine: Respondent denies each and every allegation contained in Paragraph Nine of Count I of the Complaint.

Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Complaint,

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Complaint.

Paragraph Twelve: Respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Complaint, and hereby
145 denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act or that this proceeding is in the public interest.

Paragraph Thirteen: With respect to the allegations of Paragraph Two of Count II of the Complaint, respondent denies that during any period covered by the Complaint, it has either sold or distributed white lead, white lead-in-oil, or white lead paint, and therefore denies it has ever unlawfully discriminated in any way as between customers in the sale of white lead, or lead-in-oil, or white lead paint.

Paragraph Fourteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Complaint, respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Complaint as fully as if set forth verbatim herein; and as to the definition of the term "commerce", it states that it is without knowledge or information sufficient to form a belief as to the truth of the averments with respect thereto contained in said Paragraphs Three to Five, inclusive, of Count II of the Complaint.

Paragraph Fifteen: Denies each and every allegation contained in Paragraph Six of Count II of the Com-
146 plaint, in so far as said allegations relate to it.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Seven of Count II of the Complaint but states that International Smelting & Refining Company quotes delivered prices of white lead which vary in different geographical areas sometimes referred to as zones. Said variations in delivered prices correspond substantially to those shown on the map referred to in said paragraph although they are not identical therewith. It avers that International Smelting & Refining Company's prices and methods of pricing have been adopted in good faith in order to meet the competition of other sellers of white lead who are at the same time offering to sell and selling competitive white lead products of similar quantities and grades.

Paragraph Seventeen: With respect to the allegations contained in Paragraph Eight of Count II of the Complaint, respondent states that delivered prices within certain areas quoted by respondent International Smelting & Refining Company are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area; and that the price quoted a customer located at or near
147 International Smelting & Refining Company's mill may be the same as the price quoted a customer located at a distant point in said area. All prices quoted by International Smelting & Refining Company are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Eighteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Complaint in so far as said allegations relate to it.

Paragraph Nineteen: With respect to the allegations contained in Paragraph Ten of Count II of the Complaint, respondent states that when sales are made by International Smelting & Refining Company to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered prices to purchasers in the other area contiguous to said boundary, otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty: Denies each and every allegation contained in Paragraph Eleven of Count II of the Complaint but states that International Smelting & Refining Company classifies certain non-competitive customers such as railroads, dealers and industrial users, and that it
148 makes due allowance for differences in the cost of sale and delivery resulting from different quantities in which white lead is purchased by certain purchasers in certain areas.

Paragraph Twenty-One: Denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the Complaint.

Wherefore respondent respectfully prays that the Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside,
By Horace G. Hitchcock,
Office and Post Office Address:
No. 25 Broadway, Borough of Manhattan, New York 4, N. Y.
Attorneys for Respondent, Anaconda Copper Mining Company.

149 UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

(Caption—5253)

ANSWER OF INTERNATIONAL SMELTING AND REFINING COMPANY

(Received Feb. 14, 1945.)

The respondent International Smelting and Refining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the complaint herein.

Paragraph One: States that it is without knowledge of the reason for the belief of the Federal Trade Commission as alleged in Paragraph One of Count I of the Complaint that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision
150 of the Federal Trade Commission Act or that this proceeding is in the public interest.

Paragraph Two: States, with respect to Paragraph Two of Count I of the Complaint, that it is without knowledge or information as to any facts forming the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of white lead and that it has acted unlawfully to secure a monopolistic control over the prices of white lead in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of white lead in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States.

Paragraph Three: With respect to the allegations of Paragraph Three of Count I of the Complaint, respondent admits that Anaconda Copper Mining Company is a Montana corporation with an office at 25 Broadway, New
151 York, N. Y., and that it is a Montana corporation, with

an office at 25 Broadway, New York, N. Y., and is a wholly owned subsidiary of the respondent Anaconda Copper Mining Company.

Respondent states that it is without knowledge or information as to the truth of the allegations contained in Paragraph Three of Count I of the Complaint with respect to other respondents herein.

Paragraph Four: With respect to Paragraph Four A of Count I of the Complaint, respondent admits that white lead is a white, exceedingly fine powder and is a basic lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. It admits that white lead principally contains lead carbonate and lead hydroxide, but avers that the percentage of each may vary slightly in the products of different manufacturers. White lead is one of several lead pigments White lead is commonly referred to in its dry or powdered form by paint manufacturers as white lead or dry white lead, and is commonly referred to by painters in its paste form as lead-in-oil. It is in the form of a paste after mixing
152 with linseed oil. Either in the form of powder or paste, it is usable by paint manufacturers in producing white lead paint, although lead paste is not commonly used by paint manufacturers. Paint manufacturers may produce white lead paint of the desired consistency by grinding dry white lead with varying amounts of linseed oil, turpentine, and other thinners and driers. White lead paint of the desired consistency may be made by the painter by mixing with lead paste varying amounts of linseed oil, turpentine, and other thinners and driers. Except as expressly admitted by the foregoing admissions, respondent denies each and every allegation contained in Paragraph Four A of Count I of the Complaint.

Respondent admits the allegations contained in Paragraph Four B of Count I of the Complaint.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Complaint.

Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Complaint, respondent admits:

That certain of the respondents herein are engaged in the manufacture, sale and distribution of white lead in interstate commerce; that respondents National Lead Company and Eagle Picher Lead Company are engaged in

the manufacture of white lead paint; that white lead is
153 an important item of respondent's commerce beween and among the several States; that white lead is the principal item used in the manufacture of white lead paint; that white lead paint or paint produced from white lead-in-oil is held in high esteem by painters and users for application to exteriors of buildings and other structures. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture white lead paint.

It is without knowledge as to the period covered by the Complaint during which respondent Eagle Picher Lead Company directly sold and distributed white lead in commerce, or as to whether or when it sold such white lead in commerce indirectly through any subsidiary.

It denies that at any period covered by the Complaint, Anaconda Copper Mining Company either sold or distributed white lead, lead-in-oil or white lead paint, or that Anaconda Lead Products Company was an operating division of Anaconda Copper Mining Company.

It admits that Anaconda Lead Products Company was a partly owned subsidiary of Anaconda Copper Mining Company and until in or about 1936 was engaged in the manufacture and sale of white lead.

154 It admits that respondent has sold and distributed white lead and that Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company, has sold white lead obtained from respondent.

The total combined production of the producing respondents constitutes a very substantial proportion of all white lead produced and sold in the United States. The production and sale of white lead and white lead-in-oil by respondent constitutes a small proportion of the total produced and sold in the United States. Respondent is without knowledge or information as to the exact proportions of the total produced and sold by the respondents other than itself.

Other than as above referred to by admission, denial, or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Complaint.

Paragraph Seven: Respondent states that it is without knowledge or inforamtion sufficient to form a belief as

155 to the truth of the averments contained in Paragraph Seven; Seven A; Seven A (1), (2), (3), (4), (5), (6), (7), (8) and (9) of Count I of the Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B (1), (2), (3), (4), (5) and (6) of Count I of the Complaint, and Seven B (7) and (8) in so far as it is alleged that said Seven B (7) and (8) were done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7) and (8).

Paragraph Eight: Denies each and every allegation contained in Paragraph Eight and Eight A, B, C, D, E and F of Count I of the Complaint, and alleges that respondent quotes delivered prices for its products; that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates in certain areas between respondent's mill and the customer's location; that the variations in
156 delivered prices quoted by respondent correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Complaint but are not identical therewith; that the delivered prices quoted by respondent are calculated in terms of differentials above a par price in par territory; that the delivered prices quoted by respondent are not the same as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is known to it; that prices quoted by respondent and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of white lead who were at the same time offering and selling in the areas in which it does business competitive white lead products of similar quantities and grades; that respondent is informed and believes that dealers purchasing its lead-in-oil frequently sell the same at the same price to their customers as they sell the lead-in-oil of other respondents; that certain customers located at or near respondent's factory are charged the same price as certain customers located at a greater distance.

Paragraph Nine. Respondent denies each and every allegation contained in Paragraph Nine of Count I of the Complaint.

157 Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Complaint.

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Complaint.

Paragraph Twelve: Respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Complaint, and hereby denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

Paragraph Thirteen: With respect to Paragraph Two of Count II of the Complaint, respondent denies the truth of any charges that it has been or now is unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of white lead in commerce.

Paragraph Fourteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Complaint,
158 respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Complaint as fully as if set forth verbatim hereat, and as to the definition of the term "commerce", it states that it is without knowledge or information sufficient to form a belief as to the truth of the averments with respect thereto contained in said Paragraphs Three to Five, inclusive, of Count II of the Complaint.

Paragraph Fifteen: Denies each and every allegation contained in Paragraph Six of Count II of the Complaint in so far as said allegations relate to it.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Seven of Count II of the Complaint but states that it quotes delivered prices of white lead which vary in different geographical areas sometimes referred to as zones. Said variations in delivered prices correspond substantially to those shown on the map referred to in said paragraph although they are not identical therewith. It avers that its prices and method of pricing have been adopted in good faith in order to meet the competition of other sellers of white lead who are at the same time offering to sell and selling competitive white lead products of similar quantities and grades.

159 Paragraph Seventeen: With respect to the allegations contained in Paragraph Eight of Count II of the Complaint, respondent states that delivered prices within certain areas quoted by it are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area; and that the price quoted a customer located at or near its mill may be the same as a price quoted a customer located at a distant point in said area. All prices quoted by it are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Eighteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Complaint in so far as said allegations relate to it.

Paragraph Nineteen: With respect to the allegations contained in Paragraph Ten of Count II of the Complaint, respondent states that when sales are made to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered
160 prices to purchasers in the other area contiguous to said boundary; otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty: Denies each and every allegation contained in Paragraph Eleven of Count II of the Complaint but states that it classifies certain non-competitive customers such as railroads, dealers, and industrial users and that it makes due allowance for differences in the cost of sale and delivery resulting from different quantities in which white lead is purchased by certain purchasers in certain areas.

Paragraph Twenty-One: Denies each and every allegation containd in Paragraphs Twelve, Thirteen and Fourteen of Count II of the Complaint.

Wherefore respondent respectfully prays that the Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside
By Horace G. Hitchcock
Office & Post Office Address
No. 25 Broadway
New York, N. Y.
Attorneys for Respondent.
International Smelting and Refining Company

161 United States of America,

Before the Federal Trade Commission.

(Caption—5252)

ANSWER OF RESPONDENT, NATIONAL LEAD COMPANY

(Received Feb. 15, 1945.)

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and reserving the right to move to dismiss the complaint herein for lack of jurisdiction and all rights to object to lack of jurisdiction herein, answers the complaint of the Federal Trade Commission in the above entitled matter as follows:

Answer to Count I:

1. Answering Paragraph One of Count I, this respondent states that it is without knowledge of the reason for the belief of the Federal Trade Commission that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

2. Answering Paragraph Two of Count I, this respondent denies the truth of he charges against it therein contained and states that it is without knowledge or information as to any facts forming the basis for the charges against the other respondents.

3. Answering the allegations of Paragraph Three of Count I, this respondent admits that it is a New Jersey corporation, with its principal offices at 111 Broadway, New York, N. Y.

162 4. With respect to Paragraph Four of Count I, this respondent states: As to Subdivision A it admits that white lead is a white, exceedingly fine powder, which, when it contains principally lead carbonate and lead hydroxide (the percentages of which may vary slightly in the products of different manufacturers), is a basic

lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. White lead is one of several lead pigments. It is commonly sold to paint manufacturers in its dry or powdered form and referred to as white lead or dry white lead. It is commonly sold to painters in the form of a paste made by grinding with a small percentage of linseed oil and is referred to as lead-in-oil. So far as this respondent knows dry white lead in powder form is not used by painters in making white lead paint. White lead paint of the desired consistency may be made by mixing paste white lead or lead-in-oil with varying amounts of linseed oil and in some instances turpentine and other thinners and driers. Except as expressly admitted as above, this respondent denies each and every allegation contained in Subdivision A of Paragraph Four of Count I.

5. Answering the allegations of Paragraph Five of Count I of the complaint, this respondent admits:

That certain of the respondents herein are engaged in the manufacture, sale and distribution of white lead in interstate commerce, which is an important item of this respondent's commerce between and among the several states, and that this respondent is engaged in the manufacture of white lead paint. White lead is the principal item used in the manufacture of white lead paint, meaning paint containing no pigment other than white lead, that being the sense in which the term white lead paint is used in the paint industry. White lead paint is held in high esteem by painters and users for application to exteriors of buildings and other structures.

As to the second and third paragraphs of Paragraph Five of Count I of the complaint, this respondent states that it is without knowledge with respect thereto, except that it admits that respondents, Eagle-Picher Lead Company or Eagle-Picher Sales Company, have sold or
163 distributed white lead in commerce, and that at some period respondents, Anaconda Copper Mining Company or its Division, Anaconda Lead Products Company, or Anaconda Sales Company, or International Smelting & Refining Company, or some of them, have manufactured and sold white lead.

As to the last paragraph of Paragraph Five of Count I, this respondent admits that the total combined production of the producing respondents constitutes a very substantial proportion of all white lead produced and sold in the

United States, and that the production of this respondent represents approximately 55% of all white lead. It is without knowledge as to the exact proportion of the total produced and sold by respondents other than itself or as to the aggregate production of the other respondents.

Other than as above set forth, this respondent states that it is without knowledge with respect to the allegations contained in Paragraph Five of Count I of the complaint.

6. This respondent denies each and every allegation contained in Paragraph Six of Count I of the complaint.

7. Answering Paragraph Seven of Count I, this respondent denies each and every allegation contained in Paragraph Seven A of the complaint and in each and every subdivision thereof, except as hereinafter stated. It admits that:

On or about December 8, 1891, it acquired the properties formerly owned by Cornell Lead Co. of Buffalo, N. Y., The National Lead & Oil Co. of New York, N. Y., Atlantic White Lead & Linseed Oil Co. of New York, N. Y., Salem Lead Co. of Massachusetts, The J. H. Morley Lead Co. of Cleveland, Ohio, The Eckstein White Lead Co. of Cincinnati, Ohio, Anchor White Lead Co. of Cincinnati, Ohio, Maryland White Lead Co. of Baltimore, Maryland, American White Lead Co. of Louisville, Kentucky, Kentucky Lead & Oil Co. of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead and Oil Co. of
164 St. Louis, Missouri, Collier White Lead & Oil Co. of St. Louis, Missouri, and Red Seal Castor Oil Co. of St. Louis, Missouri, together with the following shares of stock in the following companies:

1195 shares Cornell Lead Co.
9993 shares The National Lead & Oil Co. of N. Y.
495 shares Atlantic White Lead & Linseed Oil Co.
670 shares Salem Lead Co.
1995 shares The J. H. Morley Lead Co.
6495 shares The Eckstein White Lead Co.
531 shares Anchor White Lead Co.
295 shares Maryland White Lead Co.
950 shares American White Lead Co.
267 shares Kentucky Lead & Oil Co.
9995 shares Southern White Lead Co. of Illinois

2995 shares D. B. Shipman White Lead Works
9993 shares Southern White Lead Co. of Missouri
2995 shares St. Louis Lead & Oil Co.
993 shares Collier White Lead & Oil Co.
495 shares Red Seal Castor Oil Co.

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock ownereship of which had been in or controlled by the National Lead Trust.

In February, 1906, it acquired all of the stock of United Lead Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products.

In February, 1907, it acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.). This company never engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

In March, 1913, it acquired all of the stock of the Heath & Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

In March, 1906, it acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915,
165 the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, it acquired all of the stock of Bass-Hueter Paint Company; in December, 1917, it organized National Lead Company S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, it acquired the properties and assets of Hirst & Begley Company.

It asserts and represents that the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock is the most important single factor in its determination and fixing of its price for white lead since pig lead is the principal material used in the manufacture of white lead, except that since January, 1942 its prices for white lead have been limited by government regulation.

As to Paragraph Seven B of Count I, this respondent denies each and every allegation contained therein and in each and every subdivision thereof.

8. This respondent denies each and every allegation

contained in Paragraph Eight and each of its subdivisions except as hereinafter stated. This respondent quotes delivered prices for its white lead products, which vary as between certain geographical areas, sometimes referred to as zones. Its delivered prices, within certain areas, are the same even though there are variations in freight rates between this respondent's mills or plants and the customers' locations. The variations in delivered prices quoted correspond generally to those shown on the map referred to in Paragraph Eight A of Count I of the complaint but are not identical therewith, and the zones or territories or geographical areas as shown on the map, while corresponding substantially with those used as the basis for this respondent's delivered prices, are not identical. This respondent's delivered prices are calculated in terms of differentials above a par price in par or base territory. This respondent is without knowledge as to whether the delivered prices which it quotes are the same as those quoted by its competitors, including the other respondents named herein. The pricing methods adopted by this respondent and the prices quoted by it have been adopted
166 and quoted in good faith and its prices are established on the basis of actual and anticipated costs of manufacture and costs of distribution with consideration being given to competitive factors within and without the industry. Under this respondent's pricing methods certain of its customers located at or near its plants are charged the same price as that charged to other customers located at a greater distance.

9. This respondent denies each and every allegation contained in Paragraph Nine of Count I of the complaint.

10. This respondent denies each and every allegation contained in Paragraph Ten of Count I of the complaint.

11. This respondent denies each and every allegation contained in Paragraph Eleven of Count I of the complaint.

Answer to Count II:

12. Answering Paragraph One of Count II of the complaint, this respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as therein alleged, and it hereby

denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

13. With respect to Paragraph Two of Count II of the complaint, this respondent denies the truth of the charges against it therein contained.

14. With respect to Paragraphs Three to Five inclusive of Count II of the complaint, this respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the complaint as fully as if again set forth verbatim.

167 15. This respondent denies each and every allegation contained in Paragraph Six of Count II of the complaint insofar as the same relate to it.

16. This respondent denies each and every allegation contained in Paragraph Seven of Count II of the complaint insofar as the same relate to it except as hereinafter stated. This respondent quotes delivered prices for white lead sold by it which vary in different geographical areas, sometimes referred to as zones. The variations in delivered prices correspond generally to those shown on the map referred to in said paragraph of the complaint although they are not identical therewith, and the same is true with respect to the geographical areas involved in this respondent's quotation of delivered prices as far as the said map is concerned.

17. This respondent denies each and every allegation contained in Paragraph Eight of Count II of the complaint insofar as the same relate to it, except that it admits that in the delivered prices quoted by it for its white lead the prices quoted throughout a certain geographical area will be the same throughout that area notwithstanding the fact that there may be variations in the cost of freight to deliver to a customer in one part of the geographical area as compared with delivery to another customer in another part of the area. The price quoted a customer located at or near its plant is the same as that quoted a comparable customer located at a more distant point in the same geographical area.

18. This respondent denies each and every allegation contained in Paragraph Nine of Count II of the complaint insofar as the same relate to it.

19. This respondent denies each and every allegation contained in Paragraph Ten of Count II of the complaint

insofar as the same relate to it, except that it states that, when there are sales to customers in different geographical areas located at or near the boundary dividing said areas,

this respondent's delivered prices to purchasers in
168 one area near the boundary are higher than its delivered prices to comparable customers in the other area contiguous to the boundary.

20. This respondent denies each and every allegation contained in Paragraph Eleven of Count II of the complaint but states that it has certain price classifications which make due and proper allowance for differences in the cost of sale and delivery resulting from the differences in the quantities of white lead purchases.

21. This respondent denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the complaint.

Wherefore, this respondent respectfully prays that the complaint herein be dismissed.

National Lead Company
By Harold Rowe,
Vice-President.

Alexander & Green,
Attorneys for Respondent,
National Lead Company,
120 Broadway,
New York 5, N. Y.

169 UNITED STATES OF AMERICA.

Before the Federal Trade Commission.

(Caption 5253)

ANSWER OF THE SHERWIN-WILLIAMS COMPANY.

(Received Feb. 15, 1945.)

Comes now respondent, The Sherwin-Williams Company, by its attorneys, Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, N. W., Washington 5, D. C., and T. J. McDowell, 101 Prospect Avenue, N. W., Cleveland, Ohio, and makes this its answer to the complaint issued by the Federal Trade Commission on the 25th day of November 1944:

Count I.

Paragraph One—For answer to Paragraph One of Count I, The Sherwin-Williams Company states it is without knowledge or information as to the reasons for the Commission's belief that it and the other respondents named in the complaint herein have violated the provisions of Section Five of the Federal Trade Commission Act and that a proceeding thereunder is in the interest of the public. It denies, however, that it has in any way violated any of the provisions of the Federal Trade Commission Act or that this proceeding is in the interest of the public and demands strict proof thereof.

Paragraph Two—For answer to Paragraph Two of Count I, The Sherwin-Williams Company denies that
170 it has in any way combined, conspired, or cooperated with the other respondents in this proceeding, or with anyone else, to hinder, lessen or eliminate price competition in the sale of white lead in the United States, and further denies that it is using or has used unfair, oppressive, discriminatory or deceptive acts, methods or practices in connection with the sale of white lead in the United States and demands strict proof thereof. It is without knowledge or information as to the truth of the allegations set forth in Paragraph Two with respect to practices allegedly pursued by National Lead Company.

Paragraph Three—For answer to Paragraph Three of Count I, The Sherwin-Williams Company admits that it is an Ohio corporation and that its principal offices are located at 101 Prospect Avenue, N. W., Cleveland, Ohio. It is without knowledge or information as to the truth of the allegations set forth in sub-sections (a), (b), (c), (d), (e) and (g) of Paragraph Three.

Paragraph Four—For answer to Paragraph Four of Count I, The Sherwin-Williams Company admits that white lead is a white, exceedingly fine powder and is a basic lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. It admits that white lead principally contains lead carbonate and lead hydroxide, but avers that the percentage of each may vary slightly in the products of different manufacturers. White lead is one of several lead pigments. White lead is commonly referred to in its dry or powdered form by paint manufacturers as white lead or

dry white lead, and is commonly referred to by painters in its paste form as lead-in-oil. It is in the form of a paste after mixing with linseed oil. Either in the
171 form of powder or paste, it is usable by paint manufacturers and painters in producing white lead paint, although lead paste is not commonly used by paint manufacturers. White lead paint of the desired consistency may be made by mixing with white lead or lead-in-oil varying amounts of linseed oil, and in some instances turpentine, and other thinners and driers. Except as hereinbefore expressly admitted, The Sherwin-Williams Company denies each and every allegation contained in sub-paragraph A of Paragraph Four. It admits the allegations contained in sub-paragraph B of Paragraph Four.

Paragraph Five—For answer to Paragraph Five of Count I, The Sherwin-Williams Company admits that it is engaged in the manufacture, sale and distribution of white lead and in the use of white lead in the occasional manufacture of white lead paint; that white lead is the principal item in the manufacture of white lead paint and is an important item in commerce between and among the several states but avers that it is engaged only occasionally in the manufacture of white lead paint on orders pursuant to specification bids.

This respondent is without knowledge or information as to the truth of the allegations in the second and third sub-paragraphs of Paragraph Five which allegations are concerned with alleged activities of respondents other other than the Sherwin-Williams Company.

This respondent admits the total combined production of the producing respondents constitutes a very substantia proportion of all white lead produced and sold in the United States, but is without knowledge or information
172 as to the exact proportions produced and sold by the other respondents herein. It avers that its production and sale of white lead and white lead-in-oil, when formerly pursued in normal course of business, constituted an extremely small proportion of the total produced and sold in the United States and did not exceed 3% of the total. Except insofar as this respondent has stated that it is without knowledge or information or has admitted the allegations of Paragraph Five it denies all of such allegations and demands strict proof thereof.

Paragraph Six—For answer to Paragraph Six of Count

I, The Sherwin-Williams Company denies each and every allegation thereof and specifically denies that it has in any way violated Section Five or any other section of the Federal Trade Commission Act by combining, conspiring and cooperating with any of the other respondents herein or any other person, firm or corporation for the purpose or with the effect of injuriously or unlawfully affecting competition in the sale of white lead in commerce between and among the several states and demands strict proof thereof.

Paragraph Seven—For answer to Paragraph Seven of Count I, The Sherwin-Williams Company states that it is without knowledge or information as to the truth of the allegations contained in the first two sentences of Paragraph Seven and in sub-paragraph A thereof and in sub-sections 1 to 9, inclusive, of sub-paragraph A thereof, which allegations refer solely to alleged activities of another respondent.

The Sherwin-Williams Company denies each and every allegation of sub-paragraph B of Paragraph Seven, 173 including sub-sections 1 to 8, inclusive, and further denies that it has in any way cooperated with or rendered assistance to any of the other respondents named in this complaint, or with the Lead Industries Association, in doing or performing any of the acts or engaging in any of the methods or practices described in sub-sections 1 to 8, inclusive, of sub-paragraph B of Paragraph Seven, and demands strict proof thereof.

Paragraph Eight—For answer to Paragraph Eight of Count I, The Sherwin-Williams Company denies each and every allegation thereof and in sub-paragraphs A to F, thereof, except insofar as hereinafter specifically admitted, and demands strict proof thereof. It avers that its method and practice of arriving at the prices at which it has quoted and sold white lead, represents its own individual and independent course of action. It admits that as part of its method of arriving at its white lead quotations and prices, it has divided the entire continental United States into geographical zones and that in the zones other than the base or par zone, a varying differential is added. It denies that its adoption and use of a pricing system which includes determination of a par or base zone price plus an added differential for more distant zones, plus actual freight from the nearest shipping point to destination in all sales when the purchaser resides outside of the city

where the shipping point is located, contributes to, furthers the hindrance of, lessens, suppresses, or eliminates price competition between it and the other respondents in the sale of white lead. It further denies that dealer purchasers located in one zone are in competition to any substantial extent with dealer purchasers located in any other zone.

174 It avers, on the contrary, that such system has a tendency to preserve competition and to prevent such territorial monopoly as would arise under any other system. It avers that such division was decided upon and has been followed in good faith from competitive necessity, and was not arrived at arbitrarily. It avers further that its division of the continental United States into geographical zones does not entirely coincide with the division alleged in Paragraph Eight and illustrated in the map made a part thereof, and is at variance therewith, particularly with respect to portions of the states of California, Oregon, Washington, Idaho and Nebraska.

The Sherwin-Williams Company avers that it maintains a number of branches in each zone; that when orders are received by it from purchasers other than those who buy in relatively small quantities direct from its branch stores, shipments in furtherance of such orders are generally made from the shipping point nearest the purchaser's location, although in some instances shipment is made from the factory at Chicago, Illinois; that irrespective of where the shipment originates the purchasers are charged the zone price for the respective zone plus actual freight from the nearest shipping point to the purchaser's location; that the actual delivered cost to any destination in any zone varies from the delivered cost to any other destination in the same zone to the extent of the difference in the applicable freight rates from the nearest shipping point to the respective destinations; that purchasers located at or near any of these respective shipping points do in fact obtain a lower delivered cost than other purchasers in the same zone who are located farther

175 from such shipping point; that the delivered cost to the various destinations in any zone do in fact reflect differences in the costs of delivery to purchasers at such varying locations.

The Sherwin-Williams Company avers that the differentials applied to the zones other than its par or base

zone, are not arbitrary mark-ups, but are applied for the purpose of recouping the freight costs involved in shipping white lead from its only production factory at Chicago, Illinois, to its various shipping points.

The Sherwin-Williams Company avers, on information and belief, that the delivered prices quoted and obtained by the other respondents in connection with their respective sales of white lead, are not the same as the delivered costs for white lead to its customers, which includes f.o.b. prices at many various shipping points, plus freight to destination.

Paragraph Nine — The Sherwin-Williams Company denies each and every allegation contained in Paragraph Nine of Count I and demands strict proof thereof.

Paragraph Ten—For answer to Paragraph Ten of Count I, The Sherwin-Williams Company denies each and every allegation of said paragraph, including those set forth in sub-paragraphs A to L, inclusive and demands strict proof thereof. It also repeats and reasserts every denial contained in the foregoing paragraphs of this answer. It further specifically denies that the effect of its adoption, use, and maintenance of a zoning system as a part of its pricing system, produces any of the effects alleged in sub-paragraphs A to L, inclusive, of said Paragraph Ten, and further specifically denies that such
176 effects, even if they did in fact result, which this respondent does not admit, arise by reason of any unlawful activity on the part of this respondent within the purview of the Federal Trade Commission Act.

The Sherwin-Williams Company avers that all of the pig-lead purchased by it for use in manufacturing white lead, is actually shipped by the sellers thereof to The Sherwin-Williams Company at Chicago, Illinois, and it is without knowledge or information as to the factors taken into account by the sellers of such pig lead in determining the price thereof to it, and consequently is without knowledge as to whether any transportation charges, phantom or otherwise, are taken into account by the sellers of such pig lead except such charges as it actually pays in connection with the purchase of pig lead f.o.b. actual shipping point.

The Sherwin-Williams Company avers that purchasers of white lead who are located near any one of its various shipping points in the several zones do in fact obtain the

advantages in freight rates which naturally accrue to those purchasers who are located nearer such a point, freight-wise, than other purchasers who are located more distantly, freight-wise, and that the purchasers nearby such shipping points do not pay transportation charges or freight in excess of the actual applicable freight from the various shipping points in the several zones to the respective purchasers' destinations.

Paragraph Eleven—The Sherwin-Williams Company denies each and every allegation contained in Paragraph Eleven of Count I and specifically denies that it entered into any combination, agreement or understanding of
177 the character set forth in the complaint, with any of the other respondents or that any of its acts, practices, pricing methods, systems or policies are unfair or prejudicial to the public, or deprive the public of the benefit of competition or create discrimination among competitive buyers and users of white lead and white lead paint or constitute unfair methods of competition or unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act;

Wherefore, The Sherwin-Williams Company prays that Count I of the complaint herein be dismissed as to it.

Count II.

Paragraph One—For answer to Paragraph One of Count II, The Sherwin-Williams Company is without knowledge or information as to the reasons for the Commission's belief that it and the other respondents named in the complaint herein have violated the provisions of Section Two of the Clayton Act as amended by the Robinson-Patman Act and that a proceeding thereunder is in the interest of the public but it specifically denies that it has in any way violated any of the provisions of the said Clayton Act as amended by the Robinson-Patman Act or that this proceeding is in the interest of the public and demands strict proof thereof.

Paragraph Two—For answer to Paragraph Two of Count II, The Sherwin-Williams Company avers the various allegations set forth therein are so vague and indefinite as to the character of unlawful discriminations attempted to be charged that it is without knowledge or in-

formation as to which of its pricing activities are
178 alleged as constituting unlawful discriminations in price; that such charges, as stated, are conclusions only, and that it is unable to reply definitely and in detail in response to such charges as are stated in said Paragraph Two without the necessary particulars with relation to the specific transactions which form the basis of such alleged violations being furnished to it. This respondent, does, however, expressly deny that it has been, or is, violating Section Two of the Clayton Act or that it is unlawfully discriminating between its customers in the prices it charges, demands, accepts and receives in connection with the sale of white lead in commerce and demands strict proof thereof.

Paragraphs Three to Five, Inclusive—In answer to the charges stated in Paragraphs Three, Four and Five of Count II, The Sherwin-Williams Company repeats, reasserts and incorporates herein its answer to Paragraphs Three to Five, inclusive, of Count I of the complaint herein as fully as if set forth herein.

Paragraph Six—In answer to the charges stated in Paragraph Six of Count II, The Sherwin-Williams Company adopts and reasserts the statement it has heretofore made in answer to Paragraph Two of Count II and also specifically denies each and every allegation set forth in said Paragraph and demands that prior to the beginning of this case on the merits it be furnished with the particulars as to the specific transactions forming the basis of the charge so stated in Paragraph Six in order that it may answer with respect thereto more specifically, and also demands strict proof of such charges.

Paragraphs Seven, Eight and Nine—In answer to
179 Paragraphs Seven, Eight and Nine of Count II, The Sherwin-Williams Company denies each and every allegation contained in each of said paragraphs, and demands strict proof of each of such allegations. Further in answer to said Paragraphs Seven, Eight and Nine, this respondent repeats, reasserts and incorporates herein its answer to Paragraph Eight of Count I of the complaint as fully as if set forth herein.

Paragraph Ten—In answer to Paragraph Ten of Count II, The Sherwin-Williams Company avers that when sales are made to purchasers who are located at or near the boundary between two zones the delivered cost to such

purchasers in one zone may be higher than the delivered cost to purchasers in the other zone and also avers that there is no substantial competition between dealer purchasers located in one zone with dealer purchasers located in any other zone. Except as hereinabove admitted this respondent denies each and every allegation contained in said Paragraph Ten and specifically denies that those purchasers who may be located at or near the boundary of adjoining or contiguous zones and who may incur different delivered costs are in competition with each other in the sale of this respondent's white lead.

Paragraph Eleven—In answer to Paragraph Eleven of Count II, The Sherwin-Williams Company denies each and every allegation thereof and specifically denies that it classifies any of its customers who purchase its white lead for resale in any manner except with respect to quantity discounts. It avers that all customers who purchase its white lead for resale are in a single dealer classification and all receive the same quantity discounts
180 and that such dealer purchasers in any one zone are not engaged in competition in any substantial way with similar dealer purchasers in any other zone. This respondent admits that it has classified certain customers who purchase for use rather than resale, such classifications being as follows:

(1) Contracting painters and large maintenance accounts sold direct.

(2) Industrial accounts (including public utilities, privately-owned street railways, petroleum industry)

(3) Railroad and marine accounts

(4) Federal Government, States and Municipalities, and municipally-owned street railways and W. P. A. accounts, and

(5) Small consumers.

It avers that the members of no one of such classifications are competitive, in any way, with the members of any other classification, including the dealer classification.

In applying varying prices to all of such classifications, including the dealer classification, this respondent extends differentials which make only due allowance for differences in the cost of manufacture, cost of selling and cost of delivery resulting from the differing methods or quantities in which its white lead is sold and delivered to

such classifications. The Sherwin-Williams Company avers that sales made by it to such purchaser-users who do not buy for resale and who are not competitive with each other do not come within the purview of Section Two of the Clayton Act as amended by the Robinson-Patman Act.

181 Paragraph Twelve—For answer to Paragraph Twelve of Count II, The Sherwin-Williams Company denies each and every allegation thereof and demands strict proof thereof.

Paragraph Thirteen—For answer to Paragraph Thirteen of Count II, The Sherwin-Williams Company denies each and every allegation thereof, including those set forth in sub-paragraph A which are adopted from sub-paragraphs A to H, inclusive, of Paragraph Ten of Count I and also including those allegations set forth in sub-paragraphs B and C of Paragraph Thirteen of Count II. It also repeats and reasserts every denial contained in the foregoing paragraphs of this answer to the various charges stated under Count II of the complaint and also repeats and reasserts, insofar as applicable, all of the statements made by it in answer to Paragraph Ten of Count I and incorporates such statements by reference the same as if copied herein in full.

Paragraph Fourteen—For answer to Paragraph Fourteen of Count II, The Sherwin-Williams Company denies that it has in any way violated the provisions of sub-section (a) of Section Two of the Clayton Act as amended by the Robinson-Patman Act;

Wherefore, The Sherwin-Williams Company prays that Count II of the complaint herein be dismissed as to it.

First Special Defense.

Further answering, and for a first special defense, The Sherwin-Williams Company alleges that its pricing activities which are charged in Counts I and II of the complaint herein as constituting violations, respectively, of the Federal Trade Commission Act and of the Clayton Act as

182 amended by the Robinson-Patman Act were initiated many years ago, and have been pursued subsequently, in a good faith effort to successfully compete, in price and otherwise, with other sellers of white lead who were, and are, simultaneously offering for sale and selling to the

same classes of purchasers white lead of substantially similar grade and quality in commerce, as "commerce" is defined in such Acts of Congress, and in direct competition with this respondent despite the fact that this respondent has been at all times a very small producer and primary seller of white lead, selling not more than 3% of the total annual volume and that under such circumstances its pricing activities do not constitute unfair methods of competition or unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act or unlawful price discriminations under Section Two of the Clayton Act as amended by the Robinson-Patman Act and are not otherwise unlawful.

Second Special Defense.

Further answering, and for a second special defense, The Sherwin-Williams Company alleges, contrary to the allegations of the complaint, that any pricing system for a standardized product such as white lead which results, irrespective of the respective purchasers' distance from the factory or of the relative location of the seller's factory and the factories of its competitors and of other competitive factors, in a uniform net factory return on all sales, or any other system substantially different from that used by this respondent as detailed herein, has the necessary tendency and capacity to create territorial
183 spheres of monopoly for each manufacturer, seller or dealer within which spheres such manufacturer, seller or dealer can set or determine, within broad limits, the price at which he is able to sell and still prevent any other competitor having a freight disadvantage from competing in such territory and also has the necessary tendency and capacity to ultimately eliminate the smaller manufacturers, sellers and dealers such as this respondent from competition in such commerce and thereby to substantially lessen, hinder, restrict and suppress competition and to create and encourage monopolies, and also has the further necessary tendency and capacity of disrupting, suppressing and eliminating competition among sellers of white lead on a national scale or on a large territorial scale all to the detriment and injury of the purchasers of white lead and also of the public generally.

Third ~~Special Defense.~~

Further answering, and for a third special defense, The Sherwin-Williams Company alleges that where its net return from sales of identical quantities to identical classes of purchasers in different zones varies, such variance does not constitute a discrimination in price between different purchasers of a commodity of like grade and quality within the purview of Section Two of the Clayton Act as amended by the Robinson-Patman Act and does not constitute an unfair method of competition or an unfair act or practice within the meaning of the Federal Trade Commission Act and is not otherwise unlawful.

Wherefore, The Sherwin-Williams Company prays that the Commission enter an order dismissing Counts I
184 and II of the complaint in the above-entitled case, insofar as this respondent is concerned.

Respectfully submitted,
Raymond N. Beebe,
James T. Welch,
T. J. McDowell.

Of Counsel:
Davies, Richberg, Beebe,
Busick & Richardson,
815 Fifteenth Street, N. W.,
Washington 5, D. C.
Dated: February 14, 1945.

185 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

ANSWER.

(Received Feb. 16, 1945.)

And now come The Eagle-Picher Lead Company and The Eagle-Picher Sales Company and without waiving their right to object to the jurisdiction of the Federal Trade Commission over the subject matter of the Complaint make Answer to the Complaint as follows:

1. Respondents admit their corporate identity as set forth in the Complaint.

2. Respondents deny illegal conduct under the Federal Trade Commission Act and under the Clayton Act.

3. Respondents assert that, while many facts stated in the Complaint are true or partially true, the statement of these facts is so commingled with interpretative pleading as to require formal denial of many individual paragraphs.

Hence, to avoid repetition in answering the individual
186 paragraphs respondents state that the facts hereinafter enumerated are true and that the subsequent denial of the truth of individual paragraphs of the Complaint is not intended to traverse these facts.

A. Respondents have not utilized to any considerable extent the lead mined by The Eagle-Picher Lead Company for the manufacture of white lead, but purchase substantially their entire requirement from others. Respondents are informed and believe that the lead which they purchase is, for the most part, mined in the Rocky Mountain states and refined in the Chicago industrial area.

B. Respondent, The Eagle-Picher Lead Company, operates a plant which manufactures white lead and white lead in oil at Cincinnati and these two products are resold throughout a substantial part of the United States by the respondent, The Eagle-Picher Sales Company. The respondents do not manufacture white lead at any place other than Cincinnati and do not sell white lead except that manufactured at Cincinnati.

C. Respondent, The Eagle-Picher Sales Company, sells white lead in oil on a delivered price basis.

D. Respondent, The Eagle-Picher Sales Company, in selling white lead in oil, uses a zone map similar
187 to but not identical with that contained in the Complaint. In the use of the zone system, purchasers in some zones are charged a higher price than those in other zones and purchasers in one zone are charged the same price even though some may be situated farther from respondent's plant than others.

E. Respondent, The Eagle-Picher Sales Company, has sold white lead in oil to a substantial extent on the consignment basis during a portion of the period covered by the Complaint.

F. Respondents manufacture and sell two brands of white lead, the Eagle brand and the Hammar brand. The products are identical but the Hammar brand has been sold at a slightly lower price due to the fact that it has not

been nationally advertised. Eagle brand has been and is nationally advertised and has been sold at the same price as Dutch Boy white lead manufactured by respondent, The National Lead Company. In the sale of Eagle white lead respondents have followed the price leadership of the respondent, The National Lead Company, but without any agreement or understanding with the respondent, The National Lead Company, or with anyone else as to pricing or pricing policy.

G. Respondents, in the sale of white lead in oil, give functional discounts and quantity discounts which afford the respondents the greatest possible sales vol-
188 ume and which are intended and serve to keep Eagle white lead competitive with Dutch Boy white lead. The answering respondents act independently of all of the other respondents in all respects except insofar as competition compels respondents to meet competitors' prices.

4. Respondents deny that the practices stated in the preceding paragraphs constitute unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States or that the price differentials at which respondent, The Eagle-Picher Sales Company, sells white lead substantially lessen competition or tend to create a monopoly or injure, destroy or prevent competition.

Specifically answering the numbered paragraphs contained in the two counts of the complaint, the respondents aver:

5. A. Respondents deny each and every allegation contained in Paragraph 1.

B. Insofar as the allegations of Paragraph 2 relate to these respondents they deny each and every allegation contained in this paragraph.

C. Except as heretofore admitted, respondents deny for want of knowledge all of the allegations contained in Paragraph 3.

189 D. Respondents admit that the definitions contained in Paragraph 4 are reasonably correct although the definition of "white lead" contains several rather substantial inaccuracies.

E. Respondents admit that white lead paint is a product which is held in high esteem by painters and users. Respondents further admit that the proportion which the white lead produced by The Eagle-Picher Lead Company

bears to the total amount produced in the country varies from year to year but over recent years has averaged approximately 15%. Except as previously noted, all of the other allegations contained in Paragraph 5 are denied for lack of knowledge.

F. Respondents deny each and every allegation contained in Paragraph 6 insofar as such allegations relate to these respondents.

G. Except as previously noted, respondents deny each and every allegation of Paragraph 7 and each subdivision thereof insofar as such allegations relate to these respondents.

H. Except as previously noted, respondents deny each and every allegation of Paragraph 8 and each subdivision thereof.

I. Respondents deny each and every allegation contained in Paragraph 9.

J. Respondents deny each and every allegation contained in Paragraph 10 and each subdivision thereof.

190 K. Respondents deny each and every allegation contained in Paragraph 11.

L. With respect to Count 2 and with the exceptions previously noted, respondents deny each and every allegation contained in each paragraph of said count and each subdivision of each of said paragraphs.

Wherefore these respondents respectfully pray that the Complaint herein be dismissed.

The Eagle-Picher Sales Company,
By M. Bowlley,
President.

The Eagle-Picher Lead Company,
By M. Bowlley,
President.

272 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

AMENDED COMPLAINT.

This amended complaint is filed to obtain relief from acts of respondents because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of Section 5 of an act of Congress entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of Section 2 (a) of an act of Congress entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly referred to as the "Clayton Act," as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A. sec. 13, as amended).

Count I.

The Charge Under the Federal Trade Commission Act.

Paragraph One: Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the au-
273 thority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

Nature of Charges.

Paragraph Two: Respondent National Lead Company is charged in this Count I of the amended complaint with having monopolized and attempted to monopolize the inter-

state sale of lead pigments and with having acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States, and with having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States. It and each of the other respondents are charged with using unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

Description of Respondents.

Paragraph Three: Each of the respondents is particularly named and described as follows: (a) National Lead Company, a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (sometimes hereinafter referred to merely as National). (b) Eagle-Picher Lead Company, an Ohio corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, parent corporation of respondent Eagle-Picher Sales Company. (c) Eagle-Picher Sales Company, a Delaware corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, the wholly-owned subsidiary of respondent Eagle-Picher Lead Company (sometimes hereinafter respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company both are referred to merely as Eagle-Picher). (d) Anaconda Copper Mining Company, a Montana corporation with its principal office located at 25 Broadway, New York, N. Y., parent corporation of respondent International Smelting & Refining Company (sometimes hereinafter referred to merely as Anaconda). (e) International Smelting & Refining Company, a Montana corporation with its principal office at 25 Broadway, New York, N. Y., a wholly-owned subsidiary of respondent Anaconda Copper Mining Company (sometimes hereinafter referred to merely as International). (f) The Sherwin-Williams Company, an Ohio corporation, with principal offices at 101 Prospect Avenue Northwest, Cleveland, Ohio (some-
274 times hereinafter referred to merely as Sherwin-Williams). (g) The Glidden Company, an Ohio corporation with principal offices located at Union Commerce Building, Cleveland, Ohio (sometimes hereinafter referred to merely as Glidden).

Definitions and Explanation of Terms.

Paragraph Four: Some of the terms hereinafter used are defined and explained as follows:

A. "Lead Pigments": This term includes the lead pigments commonly known in the industry as white lead, (both basic carbonate and basic sulfate of lead); blue lead; red lead (or red oxide of lead); litharge (or monoxide of lead); orange mineral and grinders' lead paste. Such pigments are marketed either as dry products, in the form of dry powder, or in oil, in the form of paste after mixture with linseed or other oils.

B. "Pig lead": Pig lead is a product derived from the smelting and refining of lead ore or lead "concentrates". The pig lead is secured after the smelting and refining has removed sulphur and other impurities from the lead ore and which are found in it as it is taken from the mines.

C. "Commerce": The term commence as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Description and History of Industry and the Commerce of Respondents.

Paragraph Five: The respondents herein, either directly or indirectly through subsidiary corporations or operating divisions, are engaged in the manufacture, sale and distribution of lead pigments in commerce, and some of them, including respondents National, Eagle-Picher, Sherwin-Williams and Glidden, are also engaged in the use of lead pigments in their manufacture of paint. The lead pigments thus produced are an important item in commerce between and among the several States. They are a principal item used in the manufacture of paint, and the paint produced from such pigments is held in high esteem by builders and users as of the highest possible quality for application to exteriors of buildings, ships and other structures. Such pigments have other important industrial and commercial uses too numerous to mention herein.

275 For a part of the period covered by this amended complaint the respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, and it has also indirectly sold and distributed such products in commerce since the formation and incorpora-

tion in the State of Delaware of its wholly-owned subsidiary, respondent Eagle-Picher Sales Company, which now serves respondent Eagle-Picher Lead Company as a marketing medium for products of the parent company.

During a part of the period covered by this complaint, respondent Anaconda Copper Mining Company engaged in the production and distribution in commerce of lead pigments through a subsidiary corporation, Anaconda Lead Products Company, and since about 1936 Anaconda Copper Mining Company has distributed in commerce the lead pigments produced by its wholly-owned subsidiary, respondent International Smelting and Refining Company through Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company.

The production of the National Lead Company and the other producing respondents accounts for substantially all of the lead pigments produced and sold in the United States, while that of National accounts for more than half of the total production of the respondents. Therefore, in the aggregate, the producing respondents are the manufacturers and primary sellers to whom purchasers and users of lead pigments must turn for supplies of lead pigments, and respondent National is the dominant producer in the field. The production and distribution of pig lead, from which lead pigments are produced, is also concentrated in the hands of a few corporations, including respondents National and Eagle-Picher.

Offenses Charged.

Paragraph Six: Respondent National Lead Company has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce. Respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company and The Glidden Company have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring and cooperating between and among themselves and with each other for the purpose and with the effect of restraining, hindering, suppressing

and eliminating competition in prices and terms of sale of lead pigments in commerce. Each of said respondents has violated and is now violating the provisions of
276 Section 5 of the Federal Trade Commission Act by engaging in and continuing unfair, oppressive and discriminatory acts, methods and practices in connection with sales and offers to sell lead pigments in commerce.

Charges Particularized.

Paragraph Seven: Respondent National Lead Company at the time of its inception, in 1891, embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of lead pigments in commerce. Pursuant to, in furtherance of, and in order to effectuate the purposes of that plan and program, respondent National has engaged in, continued and is now doing and performing and carrying on the following acts, methods and practices:

A. Bought, merged nad otherwise acquired control over or confederated with and secured the cooperation of other producers, buyers and sellers of pig lead destined for use in the manufacture of lead pigments. In furtherance of that part of its plan and program to monopolize the lead pigments industry and to secure control over the pricing of lead pigments in commerce:

(1) National, on or about December 7, 1891, succeeded to the control which had prior thereto been exercised by the National Lead Trust over the operations and activities of approximately sixteen previously independent firms engaged in the manufacture, sale and distribution of lead pigments, linseed oil and kindred products, and thereafter continued its expansion by acquiring control over additional units in the lead industry.

(2) National, in 1906, acquired control of the United Lead Company which had previously been formed through the acquisition of what had been numerous independent producers and refiners of lead.

(3) National, in 1907, acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.).

(4) National, shortly thereafter, acquired control of the business of Heath & Milligan Manufacturing Com-

pany of Chicago, the largest paint manufacturer in
277 the West, but in 1919 transferred the control of that paint manufacturer to The Glidden Company, respondent herein.

(5) National, thereafter, acquired all of the stock of the Carter White Lead Company of Chicago and Omaha, the Matheson Lead Company, the River Smelting & Refining Company, Bass-Hueter Paint Company (then the second largest manufacturer of linseed paints and varnishes on the Pacific Coast), San Francisco, Calif., the National Lead Company of Argentina, and Hirst & Begley Company (an Illinois corporation engaged in the crushing of linseed oil which was subsequently reorganized into an operating branch of the National Lead Company.).

(6) National has also secured control over a substantial part of the capital stock of respondent Eagle-Picher Lead Company. Up to February 1943, a still more substantial part of the Eagle-Picher Lead Company stock was held by one Edward J. Cornish, who had served as president of respondent National.

(7) National asserts and represents that the price of pig lead f. o. b. New York, N. Y., is the principal factor in its determination and fixing of its price for lead pigments, since pig lead is the principal item used in the manufacture of lead pigments.

(8) National through its acts, methods, practices and the relationships it has maintained and now maintains with American Smelting & Refining Company and others, through its employees, agents, representatives, officers, directors and owners, exerts a monopolistic influence upon and is an important factor in the determination and quotation of the "market" prices on pig lead in the United States and upon the pig lead prices that it incorporates as an element of and factor in computing its prices of lead pigments. American Smelting & Refining Company holds a dominant position in the sale and production of pig lead in the United States, as well as in other parts of the world and quotes prices on pig lead in terms of cents per pound f. o. b. New York City. The prices thus quoted are "ac-
cepted" and treated as the "market" prices of pig
278 lead not only by American Smelting & Refining Company but also by respondent National Lead Company and are used by both corporations as a basis for trading in that important product throughout the United States.

B. Respondent National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of lead pigments in the United States. In so doing, it has cooperated with and received assistance and cooperation from respondents Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, The Glidden Company, and the Lead Industries Association in which organization all respondents are members, in doing and performing the following acts and engaging in the following methods and practices:

(1) Agreed to adopt and have adopted and maintained a system of delivered price quotations which prevents reflection of any differences in the cost of delivery between the respective places of manufacture of respondent producers, the primary sellers and to the respective locations of intending purchasers of lead pigments;

(2) Agreed to adopt and have adopted and maintained a plan whereby the United States is divided into so-called zones whereby price offers made by the producing and primary selling respondents to all purchasers of a class throughout any one of such zones, regardless of location and the differences in freight rates from shipping point to destination, are matched, except that by prearrangement and understanding the offers made by respondents Glidden, Sherwin-Williams and International are permitted in some instances to be made and maintained at fixed differentials below the matched offers of respondents National and Eagle-Picher;

(3) Agreed to seek and secure and have sought and secured the advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents in fixing, adopting, publishing and using noncompetitive terms and conditions of sale in connection with sales and offers to sell lead pigments in commerce;

279 (4) Exchanged directly and through the office of the Lead Industries Association and with the cooperation of officials of that Association price factors and information concerning price factors expected by respondent to be used and which at times have been used by the primary sellers of lead pigments, including the respondents, in calculating, determining and announcing their offers to sell lead pigments in commerce;

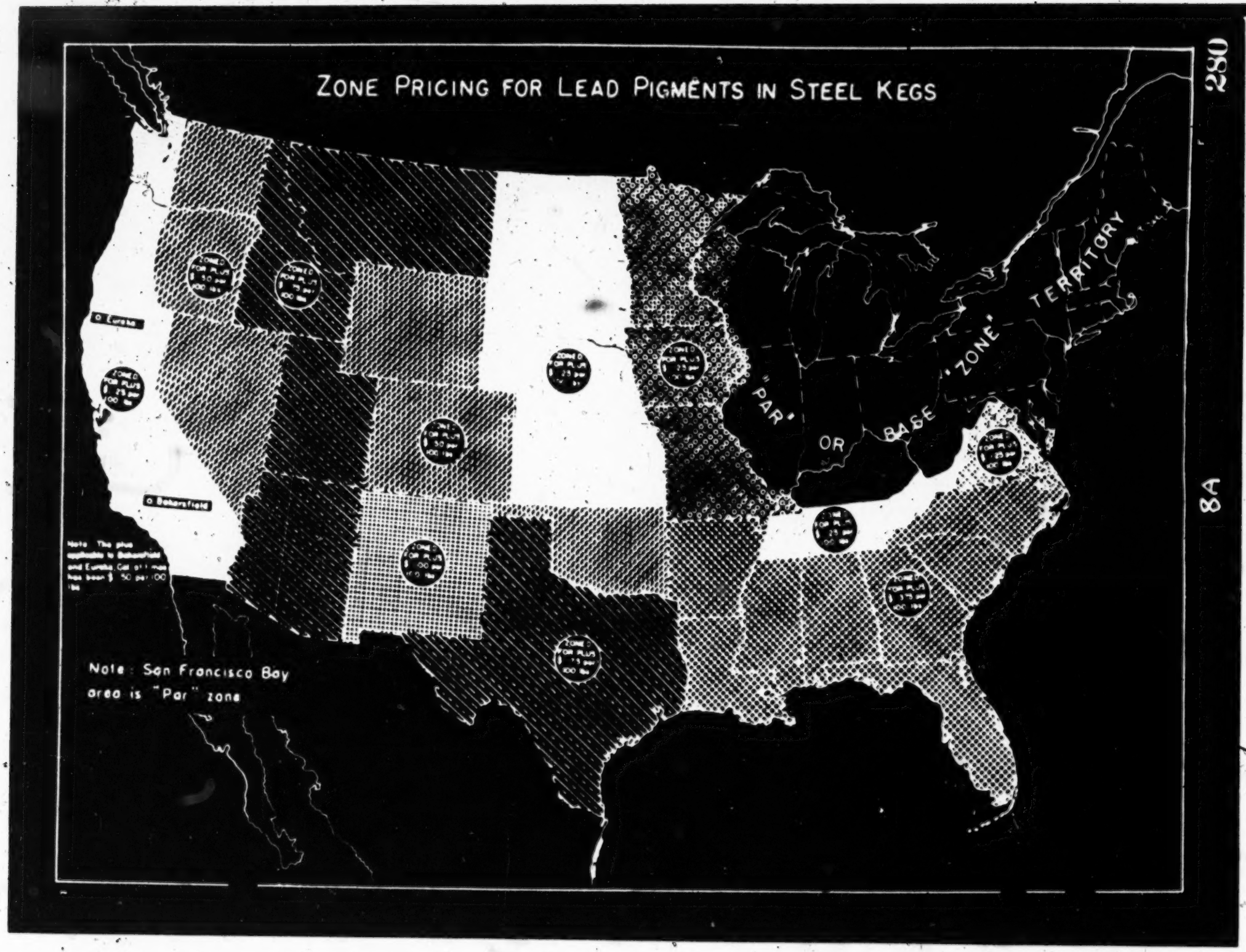
(5) Agreed to adopt and have adopted, maintained and used terms and conditions of sale embodied in so-called "consignment" or "agency" agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers selling white lead from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such "consignment" or "agency" agreements;

(6) Agreed to fix, and have fixed and included in offers to sell, the prices, terms and conditions at which lead pigments are sold and offered for sale in commerce;

(7) Respondent National entered into contracts and understandings with E. I. du Pont de Nemours Company, Inc., a large paint manufacturer, for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead.

Paragraph Eight: Each respondent, in offering for sale and selling lead pigments, divides the country into geographical zones for the purpose of price quotations. To all buyers of the same class located in the same zone, each respondent quotes the same delivered cost, irrespective of the location of the buyer within the zone. A "par" or "base" price is quoted to buyers in the "par" or "base" zone, and buyers in other zones are quoted at a fixed differential above the "par" or "base" zone price, irrespective of the transportation costs involved in selling and shipping to such customers on a delivered basis.

A. In offering for sale and selling lead pigments in steel kegs of 100 pounds or less, each respondent quotes and sells upon the basis of the geographical divisions and delivered cost differentials set out in the map inserted herein immediately following this paragraph and made a part hereof.


ZONE PRICING FOR LEAD PIGMENTS IN STEEL KEGS
"PAR" OR BASE "ZONE" TERRITORY
Note: San Francisco Bay area is "Par" zone
280
8A

281 B. In offering for sale and selling dry white lead and lead sulphate in barrels or in bags, each respondent quotes and sells at the same delivered cost to all customers in the par or base zone, and 25¢ per 100 pounds is added to the par or base price for delivery to customers located in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Washington and Wyoming, the par or base zone comprising all other states than those named.

C. In offering for sale and selling dry red lead, litharge and other pigments in barrels or bags in less-than-carload lots, each respondent quotes and sells at the same delivered cost to customers within the par or base zone; 25¢ per 100 pounds is added for delivery to customers in Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and west of the Cascade Mountains in Oregon and Washington; 50¢ per 100 pounds is added for delivery to customers in Colorado, Montana, New Mexico and Wyoming; 75¢ per 100 pounds is added for delivery to customers in Arizona, Idaho, Nevada, Utah and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other states than those named.

D. In offering for sale and selling dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more, each respondent offers to sell dry red lead at $2.50 and litharge at $1.50 per 100 pounds over the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received, delivered to customers located in the par or base zone and 25¢ per 100 pounds is added for delivery to customers located in Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other states and areas than those named.

Paragraph Nine: Terms and conditions of sale quoted by each respondent in selling and offering for sale lead pigments in commerce have included the following:

A. Each of the respondents in selling and offering to sell lead pigments in commerce to agents or dealers for resale requires its customers to resell such products
282 at prices and terms of sale fixed and determined and

published by it, so that each of respondents is responsible for the price levels to painters and consumers.

B. Each of the respondents in selling and offering to sell lead pigments quotes standard container differentials on keg products, by which 50 pound kegs are sold at a 25¢ differential above 100 pound kegs, 25 pound kegs at 25¢ above 50 pound kegs and 12½ pound kegs at 25¢ above 25 pound kegs.

C. Each respondent, in connection with the sale and distribution of lead pigments to paint manufacturers and large industrial consumers enters into quarterly contracts covering terms of sale and delivery of lead pigments, either at current published quotations or at a fixed differential over the quotation of the American Smelting and Refining Co. for common pig lead at New York. Such quarterly contracts establish the grades and qualities of lead pigments covered, the discounts applicable and the time within which deliveries must be made.

D. Each respondent issue cards or lists showing delivered quotations on lead pigments to various classes of customers for each type of pigment in various packages and quantities and applicable to the various zones and geographical divisions, and including the quotations which must be made by purchasers in reselling to consumers and others. Such "price cards" and other pricing information, when computed and calculated in accordance with the instructions and directions contained therein, cause to be presented to any given prospective purchaser of lead pigments, in any given quantity, in any given type of package, at any given destination, exactly matched offers to sell over the names of each of the respondents, except that in the case of white lead in oil the quotations to dealers or agents for resale of respondents Anaconda, Sherwin-Williams and, at times, Glidden, are matched at a small differential below the matched offers of National and Eagle-Picher.

Paragraph Ten: Each of the respondents uses the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine of this Count I for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves.

Inherently and necessarily involved is a systematic dis-
283 crimination against purchasers located near the factory of any of the respondents and in favor of customers located, freightwise, at a considerable distance.

Effects of Respondents' Actions.

Paragraph Eleven: The inherent and necessary effects of the adoption, use and maintenance by each of the respondents of the zone delivered system of pricing and other practices set forth in Paragraphs Eight and Nine of this Count I include the following, to wit:

A. Unfair and oppressive discrimination by respondents against the lead pigments purchasing and consuming public in large areas of the United States by depriving such purchasers of the natural advantage otherwise accruing to them from proximity to the factories of respondents and by compelling such purchasers to pay increases over what the net price of lead pigments to such purchasers would have been if fixed by competition among respondents, such increment in net prices to respondents approximating the advantages in freight rates to which such purchasers are entitled over purchasers remote from such factories.
284 Such nearby purchasers are thereby compelled to pay not only the actual freight rates on the products purchased by them respectively, but in effect also to pay portions of the cost of transportation of such products to other and more distant purchasers from the respective factories;

B. A substantial lessening of competition among respondents in all parts of the United States, through action of each respondent voluntarily and reciprocally surrendering and cancelling the inherent advantage it has over all competitors within the territory nearer freightwise to its factory than to the factory of a competitor, in consideration of a similar surrender and cancellation by other respondents;

C. The fixation and control through respondents' concurrent and parallel action of an arbitrary and substantial portion of the delivered cost of the product to any and every purchaser upon a basis having no relation to differences in cost of production, in selling costs, and in actual transportation cost, on particular sales. Such arbitrary result is accomplished notwithstanding substantial differences in the delivered cost to the respective respondents

of raw materials shipped to them and of lead pigments shipped by them to their respective customers.

285 **Conclusion.**

Paragraph Twelve: The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public, deprive the public of the benefit of competition; create discrimination against some buyers and users of lead pigments and lead pigment paint; have a dangerous tendency and capacity to restrain unreasonably commerce in said products; have actually hindered, frustrated, suppressed and eliminated competition in such products in commerce; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Count II.

The Charge Under the Clayton Act.

Paragraph One: Pursuant to the provisions of Section 2 (a) of an act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of said act of Congress as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby
286 issues its amended complaint, stating its charges in such respect as follows:

Nature of Charges.

Paragraph Two: The charges hereinafter contained in this Count II are that each of the respondents has been and is now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce.

Description of Respondents; Definitions and Explanation of Terms; Description and History of Industry and the Commerce of Respondents.

Paragraphs Three to Five, inclusive: As Paragraphs Three to Five, inclusive, of Count II, the Commission incorporates Paragraphs Three to Five, inclusive, of Count I of this amended complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II, except the definition of the term "commerce." The term "commerce" as hereinafter used means "commerce" as defined and set forth in the Clayton Act.

Offenses Charged.

Paragraph Six: Since June 19, 1936, and while engaged as aforesaid in commerce among the several States of the United States and the District of Columbia, each of the respondents National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, has been and is now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, sold for use, consumption or resale within the several States of the United States and the District of Columbia, in that each of the respondents has been and is now systematically selling such commodities to many purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users, including purchasers competitively engaged with others who pay either the lower or the higher discriminatory prices.

Paragraph Seven: Each of the respondents uses a "Zone Delivered Pricing Method And Practice" in calculating, determining, making up, announcing, publishing, and distributing its offers to its respective customers to sell them lead pigments in commerce. As an incident
287 to and a part of such method and practice, the entire territory of continental United States has been and is now divided by each of such respondents for pricing purposes into geographical "Zones," as alleged in Paragraph Eight of Count I of this amended complaint and the map appearing at page 8A. Paragraph Eight of Count I is hereby incorporated in this Count II to the same extent and effect as if such Paragraph were set forth in full and repeated verbatim herein.

Paragraph Eight: In using its aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, so quotes prices in its offers to sell that when it sells lead pigments in commerce in accordance and in connection therewith, the delivered cost on a specified quantity of lead pigments as paid by any one of its customers located at or near the factory door of such respondent, amounts to as much as the delivered cost on the same quantity of lead pigments as paid to such respondent by any one of other customers located hundreds of miles away in the same "Zone," although substantial differences are involved in the costs of delivery to such nearby customer and the more distantly located ones.

Paragraph Nine: Systematic discrimination in net prices against nearby customers and in favor of their more distantly located customers are inherent in the use of the aforesaid "Zone Delivered Pricing Method And Practice" when sales are effected and the buyers pay in accordance with quotations of Matched delivered costs as made by each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, to their respective customers.

Paragraph Ten: When sales are made to customers located at or near the borders of adjoining or contiguous "Zones" pursuant to the aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, charges, demands, accepts and receives higher prices from some purchasers than from other and competing purchasers in different zones and there is discrimination in the delivered costs of lead pigments to different purchasers by each of such respondents in addition to substantial differences in the mill net prices received by each of them.

288 Paragraph Eleven: Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden has been and is now classifying its customers to receive from such respondents quantity, trade and regional discounts from quoted prices so that, by virtue of such classification and action pursuant thereto by each such respondent, it charges, demands, accepts and receives higher prices in connection with sales of lead pigments in commerce from some of its customers than

from other customers, even though said customers who pay such higher prices are competitively engaged with the customers who pay such lower prices.

Paragraph Twelve: Each of the respondents practices the aforesaid systematic discriminations in price for the purpose and with the effect of enabling respondents exactly to match their offers to sell lead pigments in commerce to any given prospective purchaser at any given destination, except that as to white lead in oil the purpose and effect has been to match exactly the offers to dealers and agents for resale of respondents Anaconda, Sherwin-Williams and Glidden at a prearranged differential below similar matched offers of respondents National and Eagle-Picher.

Effects of Price Discriminations Practiced by Respondents.

Paragraph Thirteen: The discriminations in price practiced by respondents, as particularized and alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, include the results and effects set forth as follows:

A. The allegations of the results and effects that are made and set out in subparagraphs A, B and C of Paragraph Eleven of Count I hereof are hereby alleged as results and effects of respondents' price discriminations alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, and are hereby incorporated in this subparagraph of this Paragraph Thirteen of Count II to precisely the same extent as though each said subparagraph A, B and C of Paragraph Eleven of Count I, were set forth in full and repeated verbatim as a part hereof;

B. Further effect of the aforesaid discriminations in price by said respondents may be substantially to lessen competition in the sale and distribution of lead pig-
289 ments between said respondents and their competitors, tend to create a monopoly in the line of commerce in which the respondents are engaged and to injure, destroy and prevent competition between said respondents and their competitors in the sale and distribution of lead pigments;

C. Further effects of the aforesaid discriminations in price by said respondents may be substantially to lessen

competition between the buyers of lead pigments receiving the lower discriminatory prices from respondents and other buyers competitively engaged with such favored buyers and who pay higher discriminatory prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy and prevent competition in the lines of commerce in which purchasers from respondents engaged as between the beneficiaries of said discriminatory prices and competing buyers who are required to pay the higher discriminatory prices.

Conclusion.

Paragraph Fourteen: Therefore the aforesaid discriminations in price by each of the respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A., sec. 13, as amended).

Wherefore, the Premises Considered, the Federal Trade Commission on this 12th day of April, A. D. 1946, issues its amended complaint against said respondents.

Notice.

Notice is hereby given you, National Lead Company, a corporation, Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation, Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation, The Sherwin-Williams Company, a corporation, and The Glidden Company, a corporation, respondents herein, that the 17th day of May, A. D., 1946, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission, in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this amended complaint, at which time and
290 place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the amended complaint.

You are notified and required, on or before the twentieth day after service upon you of this amended complaint, to file with the Commission an answer to the amended complaint. If answer is filed and if your appearance at the

place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires
291 to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

In Witness Whereof, the Federal Trade Commission has caused this, its amended complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 12th day of April, A.D., 1946.

By the Commission.

Otis B. Johnson,
Secretary.

296 UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

(Caption—5253)

ANSWER OF RESPONDENT, NATIONAL LEAD COMPANY, TO AMENDED COMPLAINT.

(Received May 27, 1946.)

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and reserving the right to move to dismiss the amended complaint herein for lack of jurisdiction and all rights to object to lack of jurisdiction herein, answers the amended complaint of the Federal Trade Commission in the above entitled matter as follows:

Answer to Count I:

1. Answering Paragraph One of Count I of the amended complaint, this respondent states that it is without knowledge of the reason for the belief of the Federal Trade Commission that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

2. Answering Paragraph Two of Count I of the amended complaint, this respondent denies the truth of the charges against it therein contained and states that it is without knowledge or information as to any facts forming the basis for the charges against the other respondents.

297 3. Answering the allegation of Paragraph Three of Count I of the amended complaint, this respondent admits that it is a New Jersey corporation, with its principal offices at 111 Broadway, New York, N. Y.

4. Answering the allegations of Paragraph Five of Count I of the amended complaint, this respondent admits: That certain of the respondents herein are engaged in the manufacture, sale and distribution of certain lead pigments in interstate commerce, and that this constitutes an

important item of this respondent's commerce between and among the several States, and that certain of the respondents herein are engaged in the manufacture of paint in which there are used certain of the lead pigments referred to in the amended complaint, and that the paint produced from such lead pigments is held in high esteem by painters and users for application to exteriors of buildings, ships and other structures.

As to the second and third paragraphs of Paragraph Five of Count I, this respondent denies that it has any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained, except that it admits that respondents, Eagle-Picher Lead Company, or Eagle-Picher Sales Company, have sold or distributed certain lead pigments in commerce, and that at some period respondent, Anaconda Copper Mining Company, or its Division, Anaconda Lead Products Company, or Anaconda Sales Company, or respondent, International Smelting & Refining Company, or some of them, have manufactured and sold certain lead pigments in commerce.

As to the last paragraph of Paragraph Five of Count I, this respondent admits that the total combined production of the producing respondents constitutes a very substantial proportion of all lead pigments produced and sold in the United States, and that the production of this respondent represents approximately 50% of the production of lead pigments of the respondents, but it asserts that it is without knowledge as to the exact proportion of the total produced and sold by respondents other than itself or as to the aggregate production of the other respondents.

298 Except as hereinabove specifically admitted or otherwise denied, this respondent denies each and every allegation contained in Paragraph Five of Count I of the amended complaint.

5. This respondent denies each and every allegation contained in Paragraph Six of Count I of the amended complaint.

6. Answering Paragraph Seven of Count I of the amended complaint, this respondent denies each and every allegation contained in Paragraph Seven A of the amended complaint and in each and every subdivision thereof, except as hereinafter stated. It admits that:

On or about December 8, 1891, it acquired the properties formerly owned by Cornell Lead Co. of Buffalo, N. Y., The National Lead & Oil Co. of New York, N. Y., Atlantic White

Lead & Linseed Oil Co. of New York, N. Y., Salem Lead Co. of Massachusetts, The J. H. Morley Lead Co. of Cleveland, Ohio, The Eckstein White Lead Co. of Cincinnati, Ohio, Anchor White Lead Co. of Cincinnati, Ohio, Maryland White Lead Co. of Baltimore, Maryland, American White Lead Co. of Louisville, Kentucky, Kentucky Lead & Oil Co. of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead and Oil Co. of St. Louis, Missouri, Collier White Lead & Oil Co. of St. Louis, Missouri, and Red Seal Castor Oil Co. of St. Louis, Missouri, together with the following shares of stock in the following companies:

1195 shares Cornell Lead Co.
9993 shares The National Lead & Oil Co. of N. Y.
495 shares Atlantic White Lead & Linseed Oil Co.
670 shares Salem Lead Co.
1995 shares The J. H. Morley Lead Co.
6495 shares The Eckstein White Lead Co.
531 shares Anchor White Lead Co.
295 shares Maryland White Lead Co.
950 shares American White Lead Co.
267 shares Kentucky Lead & Oil Co.
9995 shares Southern White Lead Co. of Illinois
2995 shares D. B. Shipman White Lead Works
299 9993 shares Southern White Lead Co. of Missouri
2995 shares St. Louis Lead & Oil Co
993 shares Collier White Lead & Oil Co.
495 shares Red Seal Castor Oil Co.,

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock ownership of which had been in or controlled by the National Lead Trust.

In February, 1906, it acquired all of the stock of United Lead Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products.

In February, 1907, it acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.). This company never engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

In March, 1913, it acquired all of the stock of the Heath

& Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

In March, 1906, it acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915, the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, it acquired all of the stock of Bass-Hueter Paint Company; in December, 1917, it organized National Lead Company S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, it acquired the properties and assets of Hirst & Begley Company.

It asserts and represents that prior to January, 1942 the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock was the most important single factor in its determination of its price for white lead and that as to certain of the other lead pigments the price of pig lead was the most important single factor in its determination of its prices for such pigments, and that since January, 1942, its prices for lead pigments have been controlled by the Office of Price Administration.

300 As to Paragraph Seven B of Count I of the amended complaint, this respondent denies each and every allegation contained therein and in each and every subdivision thereof.

7. This respondent denies each and every allegation contained in Paragraph Eight of Count I of the amended complaint and each of its subdivisions except as hereinafter stated. This respondent quotes delivered prices for certain of its lead pigment products, which vary as between certain geographical areas, sometimes referred to as zones. Its said delivered prices within certain areas are the same irrespective of variations in transportation cost between this respondent's plants and customer locations.

As to subdivision A of Paragraph Eight of Count I of the amended complaint, it admits that the variations in its delivered prices of lead pigments in steel kegs of 100 pounds or less correspond generally to those shown on the map referred to in said subdivision A of Paragraph Eight, but denies that said price variations are identical with those shown upon said map and asserts that the zones or territories or geographical areas shown on said map while

corresponding generally with those used as the basis for this respondent's delivered prices are not identical.

As to subdivision B of Paragraph Eight of Count I of the amended complaint, this respondent admits that in offering for sale and selling dry white lead and lead sulphate in barrels or in bags it quotes and sells at the same delivered price to all customers in the par or base zone and at a delivered price of 25¢ per 100 pounds more than the par or base price to customers located in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming, the par or base zone comprising all other States than those just named.

As to subdivision C of Paragraph Eight of Count I of the amended complaint, this respondent admits that in offering for sale and selling dry red lead and litharge in barrels or bags in less-than-carload lots, it quotes and sells at the same delivered price to customers within the par or base zone; at a delivered price of 25¢ per 100 pounds more than the par or base price to customers in Alabama, 301 California, Florida, Georgia, Louisiana, Mississippi, Texas and west of the Cascade Mountains in Oregon and Washington; at a delivered price of 50¢ per 100 pounds more than the par or base price to customers in Colorado, Montana, New Mexico and Wyoming; at a delivered price of 75¢ per 100 pounds more than the par or base price to customers in Arizona, Idaho, Nevada, Utah and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other States than those named.

As to subdivision D of Paragraph Eight of Count I of the amended complaint, this respondent admits that in offering for sale and selling dry red lead and litharge in barrels or bags in carload lots of 20 tons or more, it has offered to sell dry red lead at a delivered price of $2.50 and litharge at a delivered price of $1.50 per 100 pounds more than the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received, to customers located in the par or base zone and at a delivered price of 25¢ per 100 pounds more than the par or base price to customers located in Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Texas, Utah, Wyoming and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other States and areas than those named.

8. This respondent denies each and every allegation contained in Paragraph Nine of Count I of the amended complaint and in each and every subdivision thereof, except that it admits that in respect to white lead-in-oil it has in the past entered into certain agency contracts, for the terms and conditions of which it begs leave to refer to the originals of such contracts as may be produced upon the hearing of this proceeding, and it has sold lead pigments at container differentials on keg products as set forth in subdivision B of said Paragraph Nine; that as to subdivision C of said Paragraph Nine in the past this respondent did from time to time enter into certain quarterly contracts for the sale of certain lead pigments to certain paint and other manufacturers and large industrial or other concerns for their own use, in which quarterly contracts the terms
302 of sale, to-wit, delivery, grades and qualities of lead pigments and the prices thereof, were set forth, and for the exact terms and conditions thereof it begs leave to refer to the originals of any such contracts as may be produced upon the hearing of this proceeding.

9. This respondent denies each and every allegation contained in Paragraphs Ten, Eleven and Twelve of Count I of the amended complaint.

Answer to Count II:

10. Answering Paragraph One of Count II of the amended complaint, this respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as therein alleged, and it hereby denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

11. With respect to Paragraph Two of Count II of the amended complaint, this respondent denies the truth of the charges against it therein contained.

12. With respect to Paragraphs Three to Five inclusive of Count II of the amended complaint, this respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the amended complaint as fully as if again set forth verbatim.

13. This respondent denies each and every allegation

contained in Paragraph Six of Count II of the amended complaint insofar as the same relate to it.

14. This respondent denies each and every allegation contained in Paragraph Seven of Count II of the amended complaint insofar as the same relate to it except as hereinafter stated. This respondent quotes delivered prices
303 for lead pigments sold by it which vary in different geographical areas, sometimes referred to as zones. The variations in delivered prices correspond generally to those shown on the map referred to in said paragraph of the amended complaint although they are not identical therewith, and the same is true with respect to geographical areas involved in this respondent's quotation of delivered prices as far as the said map is concerned.

15. This respondent denies each and every allegation contained in Paragraph Eight of Count II of the amended complaint insofar as the same relate to it; except that it admits that in the delivered prices quoted by it for its lead pigments the prices quoted throughout a certain geographical area will be the same throughout that area notwithstanding the fact that there may be variations in the cost of freight to deliver to a customer in one part of the geographical area as compared with delivery to another customer in another part of the area. The price quoted a customer located at or near its plants is the same as that quoted a comparable customer located at a more distant point in the same geographical area.

16. This respondent denies each and every allegation contained in Paragraph Nine of Count II of the amended complaint insofar as the same relate to it.

17. This respondent denies each and every allegation contained in Paragraph Ten of Count II of the amended complaint insofar as the same relate to it, except that it states that, if there are sales by this respondent to customers in its different geographical areas or zones located at or near the boundary dividing said areas, this respondent's delivered prices to purchasers in one area near the boundary are higher than its delivered prices to purchasers in the other area contiguous to the boundary.

18. This respondent denies each and every allegation contained in Paragraph Eleven of Count II of the amended complaint but states that it has certain price classifications which make due and proper allowance for differences in
304 the cost of sale and delivery resulting from differences.

in the methods or quantities in which such lead pigments are sold and delivered.

19. This respondent denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the amended complaint.

Special Defense.

20. Further answering and for a special defense to the amended complaint, National Lead Company alleges that with respect to lead pigments the pricing methods adopted by it and the prices quoted and obtained by it, have been adopted and quoted by it in good faith, and that said prices are established by it on the basis of actual and anticipated costs of manufacture and costs of distribution with due consideration being given to competitive factors within and without the industry including, among others, such factors as the production and sale of other pigments and ready mixed paints.

Wherefore this respondent respectfully prays that the amended complaint herein be dismissed.

National Lead Company,
Harold Rowe,
Vice-President.

Alexander & Green,
Attorneys for Respondent,
National Lead Company.
120 Broadway,
New York 5, N. Y.

305. UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

ANSWER.

(Received May 27, 1946.)

And now come The Eagle-Picher Company and The Eagle-Picher Sales Company and without waiving their right to object to the jurisdiction of the Federal Trade Commission over the subject matter of the Complaint make Answer to the Complaint as follows:

Count I.

1. Paragraph One of the Complaint is denied.

2. Paragraph Two of the Complaint is denied.

3. Paragraph Three of the Complaint is admitted except that The Eagle-Picher Lead Company changed its name to The Eagle Picher Company on April 12, 1945 and the address of this respondent and The Eagle Picher Sales Company is American Building, Cincinnati, Ohio.

4. Paragraph Four of the Complaint is admitted.

5. Paragraph Five of the Complaint is admitted except for the last two lines thereof.

6. Paragraph Six of the Complaint is denied.

7. Paragraph Seven A of the Complaint is admitted save for sub-paragraph (6) which is denied.

306 8. Paragraph Seven B of the Complaint is denied save for sub-paragraph (7) in respect to which these respondents are uninformed.

9. Paragraph Eight of the Complaint is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also, prices are determined with respect to transportation costs, among other things, and no price is set "irrespective to transportation costs".

10. Paragraph Eight A is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also these respondents sell white lead in oil, but not their other products, in the manner already stipulated in this case.

11. Paragraph Eight B is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also these respondents do not sell the specified products or either of them in barrels or in the states of California, Oregon, and Washington.

12. Paragraph Eight C is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also the allegations are untrue with respect to all products other than red lead and litharge and these are not sold in bags.

13. Paragraph Eight D is denied subject to the qualification that these respondents are not reliably informed
307 in respect to the sales practice of each other respondent. Also red lead and litharge are not sold in bags;

Arkansas and Oklahoma are in the par zone and the entire states of California, Oregon, and Washington are in the same zone with Alabama, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Texas, Utah, and Wyoming. Moreover, the date the order is received is not the criterion of the price; this is now determined by the date of shipment and previously the customer had the option of choosing between the spot price and the average for the month preceding shipment.

14. Paragraph Nine A is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.

15. Paragraph Nine B is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. The allegation is true only in respect to the sale of red lead, litharge, and white lead in oil by these respondents, except for the fact that red lead and litharge are not sold in 12½ pound kegs and white lead in oil is also sold in 5 and 1 pound containers.

16. Paragraph Nine C is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.
308 However, these respondents have, in the past, utilized written instruments, often colloquially designated contracts by laymen, which performed the function of roughly forecasting quarterly business. The prices indicated by such instruments were those in effect at the commencement of the quarter which were to be altered during the quarter to give the customer the benefit of any lower price announced during the quarter, the initial price constituting the ceiling price for the period.

17. Paragraph Nine D is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.

18. Paragraph Ten is denied.

19. Paragraph Eleven is denied.

20. Paragraph Twelve is denied.

Count II.

21. Paragraph One is denied.

22. Paragraph Two is denied.

23. In respect to Paragraphs Three to Five inclusive, the answers thereto, in Count I, are repeated.

24. Paragraph Six is denied.

25. Paragraph Seven is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.

26. Paragraph Eight is denied subject to the qualification that these respondents are not reliably informed in
309 respect to the sales practice of each other respondent. These respondents acknowledge selling various products each at a uniform delivered price in a zone applicable to such product.

27. Paragraph Nine is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.

28. Paragraph Ten is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Respondents sell at different prices in different zones without discrimination.

29. Paragraph Eleven is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Respondents deviate from the prices quoted sporadically and for lawful purposes, but do not do so systematically, or according to plan.

30. Paragraph Twelve is denied.

31. Paragraph Thirteen is denied.

32. Paragraph Fourteen is denied.

Affirmative Defense.

These respondents assert that they obeyed and conformed to the National Recovery Act from the time of its passage until it was declared unconstitutional at which time they ceased all collaboration with their competitors includ-
310 ing the other respondents in this action and since have pursued wholly individualistic sales policies. Further, these respondents aver that the delivery of goods and merchandise sold in commerce from the buyer to the seller is an inherently necessary function which must be performed either by the seller or the buyer; custom in the different industries has determined which performed the function. These respondents maintain a substantial and able traffic department which is more capable of performing the delivery service more economically than a majority of the customers of the respondents. This service is performed

by these respondents for all customers uniformly upon an equal price basis. Further, the delivered price selling, zoned or otherwise, promotes competition among the pigment manufacturers and among their customers and the delivery function cannot be transposed from the sellers to the buyers without disturbing established competition which evolved legally, without creating inequities due to the happenstances of customers' locations in respect to those of pigment plants and without violating the very statutes under which this action is brought.

Wherefore these respondents respectfully pray that the Complaint herein be dismissed.

The Eagle-Picher Sales Company,
By Edmund P. Wood.
The Eagle-Picher Company,
By Edmund P. Wood.

311 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

ANSWER OF ANACONDA COPPER MINING COMPANY TO AMENDED COMPLAINT.

(Received May 27, 1946.)

The respondent Anacoda Copper Mining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the Amended Complaint herein:

Paragraph One: States that it is without knowledge of the reason for the belief of the Federal Trade Commission as alleged in Paragraph One of Count I of the Amended Complaint that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

312 Paragraph Two: States, with respect to Paragraph Two of Count I of the Amended Complaint, that it is without knowledge or information as to any facts forming

the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of lead pigments and that it has acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

Paragraph Three: With respect to the allegations of Paragraph Three of Count I of the Amended Complaint, respondent admits that it is a Montana corporation, with an office at 25 Broadway, New York, N. Y. and that respondent International Smelting & Refining Company,
313 a wholly owned subsidiary, is a Montana corporation with an office at 25 Broadway, New York, N. Y.

Respondent states that it is without knowledge or information as to the truth of the allegations contained in Paragraph Three of Count I of the Amended Complaint with respect to respondents other than itself and International Smelting & Refining Company.

Paragraph Four: Respondent admits the allegations contained in Paragraph Four A and B of Count I of the Amended Complaint, but denies that any of the terms as defined and explained therein have any application to any transactions or activities of this respondent.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Amended Complaint.

Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Amended Complaint, respondent admits:

That certain of respondents herein other than itself are engaged in the manufacture, sale and distribution of lead pigments in interstate commerce; that respondents National Lead Company and Eagle-Picher Lead Com-
314 pany are engaged in the use of lead pigments in the manufacture of paint; that lead pigments are an important item of commerce between and among several States; that lead pigments are a principal item used in the manufacture of paint; that the paint produced from such

pigments is held in high esteem by builders and users as of the highest quality for application to exteriors of buildings, ships and other structures; that lead pigments have other important industrial and commercial uses. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture paint.

It is without knowledge as to the period covered by the Amended Complaint during which respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, or as to whether or when it sold such lead pigments in commerce indirectly through any subsidiary.

It denies that in any period covered by the Amended Complaint it either produced or distributed lead pigments in commerce.

It admits that Anaconda Lead Products Company was a partly owned subsidiary and until in or about 1936 was engaged in the production and distribution of some lead pigments.

315 It admits that respondent International Smelting & Refining Company has produced and distributed some lead pigments, and that its subsidiary Anaconda Sales Company, Pigments Division, has sold lead pigments obtained from respondent International Smelting & Refining Company.

Respondent is without knowledge or information as to whether the total combined production of the producing respondents constitutes a very substantial proportion of all of the lead pigments produced and sold in the United States. The production and sale of lead pigments by respondent International Smelting & Refining Company constitute a small proportion of the total produced and sold in the United States. Respondent is without knowledge or information as to the exact proportions of the total produced and sold by the respondents other than International Smelting & Refining Company. Respondent is without knowledge or information as to whether the production and distribution of pig lead, from which lead pigments are produced, is concentrated in the hands of a few corpodations, including respondents National and Eagle-Picher.

316 Other than as above referred to by admission, denial or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Amended Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Amended Complaint.

Paragraph Seven: Respondent states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Seven; Seven A; Seven A (1), (2), (3), (4), (5), (6), (7) and (8) of Count I of the Amended Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B (1), (2), (3), (4), (5) and (6) of Count I of the Amended Complaint, and Seven B (7) in so far as it is alleged that said Seven B (7) was done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7).

Paragraph Eight: Denies each and every allegation contained in Paragraph Eight and Eight A, B, C and
317 D of Count I of the Amended Complaint, and alleges that respondent International Smelting & Refining Company quotes delivered prices for its products, dry white lead and white-lead-in-oil; that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates between International Smelting & Refining Company's mill and the customer's location in certain areas; that the variations in delivered prices quoted by International Smelting & Refining Comapny on its lead pigments in steel kegs of 100 pounds or less correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Amended Complaint but are not identical therewith; that the variations in delivered prices quoted by International Smelting & Refining Company on dry white lead correspond substantially to those alleged in Paragraph Eight B of Count I of the Amended Complaint but are not identical therewith.

That the delivered prices quoted by respondent International Smelting & Refining Company are calculated in terms of differentials above a par price in par territory; that the delivered prices quoted by respondent International Smelting & Refining Company are not the same
318 as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is

known to it; that prices quoted by respondent International Smelting & Refining Company and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of lead pigments who were at the same time offering and selling in the areas in which it does business competitive lead pigment products of similar quantities and grades; that certain customers located at or near respondent International Smelting & Refining Company's factory are charged the same price as certain customers located at a greater distance.

Paragraph Nine: Respondent denies each and every allegation contained in Paragraph Nine and Nine A, B, C and D of Count I of the Amended Complaint, and states that International Smelting & Refining Company quotes standard container differentials on keg products; that said differentials make only due allowance for differences in the cost of manufacture resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered; that International Smelting & Refining Company, in connection with the sale and distribution of its lead pigments to paint manufacturers
319 and large industrial consumers sometimes, but not always, enters into contracts covering the terms of sale or delivery of said lead pigments at current published quotations; that International Smelting & Refining Company issues certain cards or lists of proposed prices but not for the purpose of requiring adherence thereto by others nor for the purpose of matching said prices with others; that respondent is informed and believes that dealers purchasing International Smelting & Refining Company's lead pigments frequently sell the same at the same price to their customers as they sell the lead pigments of certain other respondents.

Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Amended Complaint.

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Amended Complaint.

Paragraph Twelve: Respondent denies each and every allegation contained in Paragraph Twelve of Count I of the Amended Complaint.

Paragraph Thirteen: Respondent states that it
320 is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Amended Complaint, and hereby denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

Paragraph Fourteen: With respect to the allegations of Paragraph Two of Count II of the Amended Complaint, respondent denies that during any period covered by the Amended Complaint it has either sold or distributed lead pigments, and therefore denies it has ever unlawfully discriminated in any way as between customers in the sale of lead pigments.

Paragraph Fifteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint, respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Amended Complaint as fully as if set forth verbatim hereat; and as to the definition of the term "commerce," it states that it is without knowledge or information sufficient to form a belief
321 as to the truth of the averments with respect thereto contained in said Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Six of Count II of the Amended Complaint, in so far as said allegations relate to it.

Paragraph Seventeen: Denies each and every allegation contained in Paragraph Seven of Count II of the Amended Complaint and incorporates hereat, in so far as applicable, the allegations made in Paragraph Eight above.

Paragraph Eighteen: With respect to the allegations contained in Paragraph Eight of Count II of the Amended Complaint, respondent states that delivered prices within certain areas quoted by respondent International Smelting & Refining Company are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area; and that the price quoted a customer located at or near

International Smelting & Refining Company's mill may
322 be the same as the price quoted a customer located at a distant point in said area. All prices quoted by International Smelting & Refining Company are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Nineteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Amended Complaint in so far as said allegations relate to it.

Paragraph Twenty: With respect to the allegations contained in Paragraph Ten of Count II of the Amended Complaint, respondent states that when sales are made by International Smelting & Refining Company to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered prices to purchasers in the other area contiguous to said boundary; otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty-One: Denies each and every allegation contained in Paragraph Eleven of Count II of the Amended Complaint but states that International Smelting & Refining Company classifies certain non-
323 competitive customers such as railroads, dealers and industrial users, and that it makes due allowance for differences in the cost of sale and delivery resulting from different quantities in which lead pigments are purchased by certain purchasers in certain areas.

Paragraph Twenty-Two: Denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the Amended Complaint.

Wherefore respondent respectfully prays that the Amended Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside,
By: Horace G. Hitchcock,
No. 25 Broadway,
Borough of Manhattan,
New York 4, N. Y.
Attorneys for Respondent, Anaconda Copper Mining Company.

324 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

ANSWER OF INTERNATIONAL SMELTING AND REFINING COMPANY TO AMENDED COMPLAINT.

(Received May 27, 1946.)

The respondent International Smelting and Refining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the Amended Complaint herein:

Paragraph One: States that it is without knowledge of the reason for the belief of the Federal Trade Commission as alleged in Paragraph One of Count I of the Amended Complaint that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding
325 thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

Paragraph Two: States, with respect to Paragraph Two of Count I of the Amended Complaint, that it is without knowledge or information as to any facts forming the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of lead pigments and that it has acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

326 Paragraph Three: With respect to the allegations of Paragraph Three of Count I of the Amended Complaint, respondent admits that Anaconda Copper Mining

Company is a Montana corporation with an office at 25 Broadway, New York, N. Y., and that it is a Montana corporation with an office at 25 Broadway, New York, N. Y., and that it is a wholly owned subsidiary of Anaconda Copper Mining Company.

Respondent states that it is without knowledge or information as to the truth of the allegations contained in Paragraph Three of Count I of the Amended Complaint with respect to other respondents herein.

Paragraph Four: Respondent admits the allegations contained in Paragraph Four A and B of Count I of the Amended Complaint, but, except as hereinafter admitted, denies that any of the terms as defined and explained therein have any application to any transactions or activities of this respondent.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Amended Complaint.

327 Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Amended Complaint, respondent admits:

That certain of the respondents herein are engaged in the manufacture, sale and distribution of lead pigments in interstate commerce; that respondents National Lead Company and Eagle-Picher Lead Company are engaged in the use of lead pigments in the manufacture of paint; that lead pigments are an important item of commerce between and among the several States; that lead pigments the use of lead pigments in the manufacture of paint; that the paint produced from such pigments is held in high esteem by builders and users as of the highest quality for application to exteriors of buildings, ships and other structures; that lead pigments have other important industrial and commercial uses. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture paint.

It is without knowledge as to the period covered by the Amended Complaint during which respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, or as to whether or when it sold such lead pigments in commerce indirectly through any subsidiary.

328 It denies that at any period covered by the Amended Complaint, Anaconda Copper Mining Company either produced or distributed lead pigments.

It admits that Anaconda Lead Products Company was a partly owned subsidiary of Anaconda Copper Mining Company and until in or about 1936 was engaged in the production and distribution of some lead pigments.

It admits that respondent has produced and distributed some lead pigments and that Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company, has sold lead pigments obtained from respondent.

Respondent is without knowledge or information as to whether the total combined production of the producing respondents constitutes a very substantial proportion of all the lead pigments produced and sold in the United States. The production and sale of lead pigments by respondent constitutes a small proportion of the total produced and sold in the United States. Respondent is without knowledge or information as to the exact proportions of the total produced and sold by the respondents other than itself. Respondent is without knowledge or information as to whether the production and distribution of pig lead, from which lead pigments are produced, is con-
329 centrated in the hands of a few corporations, including respondents National and Eagle-Picher.

Other than as above referred to by admission, denial, or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Amended Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Amended Complaint.

Paragraph Seven: Respondent states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Seven; Seven A (1), (2), (3), (4), (5), (6), (7) and (8) of Count I of the Amended Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B(1), (2), (3), (4), (5), and (6) of Count I of the Amended Complaint, and Seven B (7) in so far as it is alleged that said Seven B (7) was done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7).

330 Paragraph Eight: Denies each and every allegation contained in Paragraph Eight and Eight A, B,

C, and D of Count I of the Amended Complaint, except as is hereinafter admitted, and alleges that respondent quotes delivered prices for its products, dry white lead and white lead-in-oil, that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates in certain areas between respondent's mill and the customer's location; that the variations in delivered prices quoted by respondent on its lead pigments in steel kegs of 100 pounds or less correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Amended Complaint but are not identical therewith; that the variations in delivered prices quoted by respondent on dry white lead correspond substantially to those alleged in Paragraph Eight B of Count I of the Amended Complaint but are not identical therewith; that the delivered prices quoted by respondent are calculated in terms of differentials above a par price in par territory; that the delivered prices quoted by respondent are not the same as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is
331 known to it; that prices quoted by respondent and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of lead pigments who were at the same time offering and selling in the areas in which it does business competitive lead pigment products of similar quantities and grades; that certain customers located at or near respondent's factory are charged the same prices as certain customers located at a greater distance.

Paragraph Nine: Respondent denies each and every allegation contained in Paragraph Nine, Nine A, B, C and D of Count I of the Amended Complaint, except as is hereinafter admitted, and alleges that respondent quotes standard container differentials on keg products; that said differentials make only due allowance for differences in the cost of manufacture resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered; that respondent in connection with the sale and distribution of its lead pigments to paint manufacturers and large industrial consumers sometimes, but not always, enters into contracts covering the terms of sale or delivery of said lead pigments at current pub-

lished quotations; that respondent issues certain
332 cards or lists of proposed prices but not for the purpose of requiring adherence thereto by others nor for the purpose of matching said prices with others; that respondent is informed and believes that dealers purchasing its lead pigments frequently sell the same at the same price to their customers as they sell the lead pigments of certain other respondents.

Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Amended Complaint.

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Amended Complaint.

Paragraph Twelve: Respondent denies each and every allegation contained in Paragraph Twelve of Count I of the Amended Complaint.

Paragraph Thirteen: Respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Amended Complaint, and hereby denies that it has violated the provisions of
333 the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

Paragraph Fourteen: With respect to the allegations of Paragraph Two of Count II of the Amended Complaint, respondent denies the truth of any charges that it has been or now is unlawfully discriminating as between its customers in the price it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce.

Paragraph Fifteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint, respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Amended Complaint as fully as if set forth verbatim hereat, and as to the definition of the term "commerce," it states that it is without knowledge or information sufficient to form a belief as to the truth of the averments with respect thereto contained in said Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Six of Count II of the
334 Amended Complaint in so far as said allegations relate to it.

Paragraph Seventeen: Denies each and every allegation contained in Paragraph Seven of Count II of the Amended Complaint, and incorporates hereat, in so far as applicable, the allegations made in Paragraph Eight above.

Paragraph Eighteen: With respect to the allegations contained in Paragraph Eight of Count II of the Amended Complaint, respondent states that delivered prices within certain areas quoted by it are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area and that the price quoted a customer located at or near its mill may be the same as a price quoted a customer located at a distant point in said area. All prices quoted by it are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Nineteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Amended Complaint in so far as said allegations re-
335 late to it.

Paragraph Twenty: With respect to the allegations contained in Paragraph Ten of Count II of the Amended Complaint, respondent states that when sales are made to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered prices to purchasers in the other area contiguous to said boundary; otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty-One: Denies each and every allegation contained in Paragraph Eleven of Count II of the Amended Complaint but states that it classifies certain non-competitive customers such as railroads, dealers, and industrial users and that it makes due allowance for differences in the cost of sale and delivery resulting from different quantities in which lead pigments are purchased by certain purchasers in certain areas.

Paragraph Twenty-Two: Denies each and every alle-

gation contained in Paragraphs Twelve, Thirteen and
336 Fourteen of Count II of the Amended Complaint.

Wherefore respondent respectfully prays that the Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside,
Attorneys for Respondent,
International Smelting and Refining Company
By Horace G. Hitchcock
Office and P. O. Address,
No. 25 Broadway,
New York 4, N. Y.

* * * * *

352 UNITED STATES OF AMERICA,

BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

ANSWER OF THE SHERWIN-WILLIAMS COMPANY

(Received May 28, 1946)

Comes now respondent, The Sherwin-Williams Company, by its attorneys, Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, N. W., Washington 5, D. C., and T. J. McDowell, 101 Prospect Avenue, N.W., Cleveland, Ohio, and makes this its answer to the amended complaint issued by the Federal Trade Commission on the 12th day of April, 1946:

Count I.

Paragraph One—For answer to Paragraph One of Count I, The Sherwin-Williams Company states it is without knowledge or information as to the reasons for the Commission's belief that it and the other respondents named in the Amended Complaint herein have violated the provisions of Section Five of the Federal Trade Commission Act and that a proceeding thereunder is in the interest of the public. It denies, however, that it has in any way violated any of the provisions of the Federal Trade Commission Act or that this proceeding is in the interest of the public and demands strict proof thereof.

353 Paragraph Two—For answer to Paragraph Two of

Count I, The Sherwin-Williams Company denies that it has in any way combined, conspired, or cooperated with the other respondents in this proceeding, or with anyone else, to hinder, lessen or eliminate price competition in the sale of lead pigments in the United States, and further denies that it is using or has used unfair, oppressive or discriminatory acts, methods, or practices in connection with the sale of lead pigments in the United States, and demands strict proof thereof. It is without knowledge or information as to the truth of the allegations set forth in Paragraph Two with respect to practices allegedly pursued by National Lead Company.

Paragraph Three—For answer to Paragraph Three of Count I, The Sherwin-Williams Company admits that it is an Ohio corporation and that its principal offices are located at 101 Prospect Avenue, N. W., Cleveland, Ohio. It is without knowledge or information as to the truth of the allegations set forth in sub-sections (a), (b), (c), (d), (e) and (g) of Paragraph Three.

Paragraph Four—For answer to Paragraph Four of Count I, The Sherwin-Williams Company admits the allegations contained in sub-paragraphs A and B of Paragraph Four.

Paragraph Five—For answer to the first sub-paragraph of Paragraph Five of Count I, The Sherwin-Williams Company admits that it is engaged in the manufacture of dry white lead (basic carbonate), white lead in oil, dry red lead, red lead in oil, and litharge, and in the sale of a portion of its production of such lead pigments in commerce as defined in the Amended Complaint; but denies that it sells blue lead, orange mineral, or grinders lead paste in commerce. It admits that it uses both white lead and red lead in the manufacture of some types of paint, 354 but denies that its use of such lead pigments in the manufacture of paint is pertinent in any way to any of the charges stated in the Amended Complaint. This respondent also admits that white lead, red lead and litharge are important items in commerce, as defined in the Amended Complaint, and that white lead and red lead constitute principal items in the manufacture of certain, but not all, types of paint, and that such paints are held in high esteem as alleged. This respondent avers that the major portion of its production of white lead and red lead is not sold by it, but is used in the manufacture of paint

products not involved in this proceeding and that a substantial portion of its remaining production of such lead pigments is sold by it in its own retail stores in transactions which originate and are completed entirely within the confines of a single state and which are not subject to the jurisdiction of the Federal Trade Commission. This respondent avers that its production of litharge is not substantial and is sold, with few exceptions if any, only to large industrial concerns purchasing for use and not for resale.

This respondent is without knowledge or information as to the truth of the allegations in the second and third sub-paragraphs of Paragraph Five which allegations are concerned with alleged activities of respondents other than The Sherwin-Williams Company.

This respondent admits the total combined production of the producing respondents constitutes a very substantial proportion of all lead pigments produced and sold in the United States, but is without knowledge or information as to the exact proportions produced and sold by the other respondents herein. It avers, however, that its sales in commerce as defined in the Amended Complaint of such lead pigments as it does so sell constitutes a very small and negligible part of the total sales of such products by all producers. Except insofar as this respond-
355 ent has stated that it is without knowledge or information or has admitted the allegations of Paragraph Five it denies all of such allegations and demands strict proof thereof.

Paragraph Six—For answer to Paragraph Six of Count I, The Sherwin-Williams Company specifically denies that it has in any way violated Section Five or any other section of the Federal Trade Commission Act by combining, conspiring or cooperating with any of the other respondents herein or with any other person, firm or corporation for the purpose or with the effect of unlawfully restraining, hindering, suppressing or eliminating competition in the sale of lead pigments in commerce between and among the several states, or by engaging in unfair, oppressive, or discriminatory acts, methods or practices in the sale of lead pigments in such commerce.

Paragraph Seven—For answer to Paragraph Seven of Count I, The Sherwin-Williams Company states that it is without knowledge or information as to the truth of the

allegations contained in the first two sentences of Paragraph Seven and in sub-paragraph A thereof, and in sub-sections 1 to 8, inclusive, of sub-paragraph A thereof, which allegations refer solely to alleged activities of another respondent.

The Sherwin-Williams Company denies each and every allegation of sub-paragraph B of Paragraph Seven, including sub-sections 1 to 7, inclusive, and further denies that it has in any way cooperated with or rendered assistance to any of the other respondents named in this complaint, or with the Lead Industries Association, in doing or performing any of the acts or engaging in any of the methods or practices described in sub-sections 1 to 7, inclusive, of sub-paragraph B of Paragraph Seven, and demands strict proof thereof.

356 Paragraph Eight—For answer to Paragraph Eight of Count I, The Sherwin-Williams Company denies each and every allegation thereof, including those in sub-paragraphs A through D thereof, except insofar as hereinafter specifically admitted, and demands strict proof thereof. It denies that it has divided the United States into geographical zones of the character described in the Amended Complaint for price quotation purposes, or that it quotes or sells lead pigments to all buyers of the same class located in the same zone, at the same delivered price (misnamed "delivered cost" in the Amended Complaint) irrespective of the location of the buyer within the zone. It avers that as part of its method of arriving at its prices for such lead pigments as it sells it has designated certain cities located in all sections of the United States as "shipping points" and has established warehouses and shipping facilities thereat; that the price quoted at various of such cities is a base or par price and the price quoted at each of the other designated cities includes a differential added to the base or par price which differential varies according to the location of such shipping points; that the shipping points at which the base or par price is applicable and those at which differentials are added may vary depending upon the particular lead pigment being sold, and that its method of arriving at the prices at which it sells lead pigments represents its own individual and independent course of action. It further avers that when orders are received from purchasers shipments in furtherance of such orders are generally made from the shipping point nearest the

purchaser's delivery point, although in some instances shipment is made from its sole factory for manufacturing lead pigments located at Chicago, Illinois; that irrespective of where shipments originate, purchasers pay only the
357 price applicable at the shipping point nearest the ultimate destination plus actual freight or carriage costs therefrom to the purchaser's delivery point, with the result, in the case of shipments from the same shipping point or from shipping points carrying either the base or par price or the same differential above the base or par price, that the actual cost at any destination varies from the cost at any other destination only to the extent of the difference in the applicable freight or carriage costs from such shipping points to the respective destinations; that purchasers accepting delivery at or near any of its many shipping points do, in fact, obtain a lower delivered cost (but not price) than other purchasers located farther, freightwise, from the same shipping point or from any other shipping point having the same applicable price, and that the differentials applied to shipping points other than those which use the base or par price applicable to each type of lead pigment sold are not arbitrary mark-ups, but are applied for the purpose of recouping, in whole or in part, the feright or carriage costs involved in shipping such lead pigments from its only lead pigment plant at Chicago, Illinois, to its various shipping points.

For answer to sub-paragraph A of Paragraph Eight, The Sherwin-Williams Company admits that it sells dry white lead, white lead in oil, dry red lead, red lead in oil, and litharge in steel kegs of one hundred pounds or less upon the basis of price differentials (misnamed "cost differentials" in the Amended Complaint), but avers that its system of adding differentials to the base or par price when shipments are made from some of its shipping points does not coincide with the division indicated in the map forming a part of sub-paragraph A, and is at variance therewith, particularly with respect to portions of the states of
358 California, Oregon, Washington, Idaho, and Nebraska.

For answer to sub-paragraph B of Paragraph Eight, The Sherwin-Williams Company admits that it sells dry white lead in barrels or in bags on a system whereby a differential is added to the base or par price in connection with sales in certain territories, but denies that such territories are properly described. It also avers that it does not sell lead sulphate.

For answer to sub-paragraph C of Paragraph Eight, The Sherwin-Williams Company admits that it sells dry red lead and litharge in barrels or bags in less than carload lots upon a system whereby a differential is added to the base or par price in connection with sales in certain territories, but denies that such territories are properly described. It avers that its total sales of such products in less than carload lots is extremely small. It denies that it sells any lead pigments other than dry white lead, dry red lead, and litharge in barrels or bags.

For answer to sub-paragraph D of Paragraph Eight, The Sherwin-Williams Company admits that in selling dry red lead and litharge in barrels or bags in carload lots of twenty tons or more it sells such products upon a system whereby a differential is added to the base or par price in connection with sales in certain territories, but denies that such territories are properly described. It also denies that its price quotations for such products are at a fixed differential over the American Smelting & Refining Company's closing price of common pig lead at New York on the date the order is received. It avers that dry red lead and litharge are sold only to large industrial users and its price quotations to such customers are based on a differential above the then market price of common pig lead at New York.

359 For further answer to sub-paragraphs B, C, and D of Paragraph Eight, The Sherwin-Williams Company states that its sale of the lead pigments referred to in said sub-paragraphs is negligible.

Paragraph Nine—For answer to Paragraph Nine of Count I, The Sherwin-Williams Company denies each and every allegation thereof, including those in sub-paragraphs A through D thereof, except insofar as herein specifically admitted, and demands strict proof thereof.

For specific answer to sub-paragraph A, the Sherwin-Williams Company denies that it requires its dealer customers who purchase for resale to resell lead pigments bought from it at prices or terms of sale fixed and determined by it, and denies that it is responsible for the price levels for such products beyond its sale thereof to its own customers. It admits that it suggests to its dealers' resale prices for sales by such dealers to painters and consumers, but denies that it has any power to require, or exerts any effort toward requiring, that the suggestions be followed,

or that it polices in any way the price levels used by such dealers.

For specific answer to sub-paragraph B, The Sherwin-Williams Company admits that in its sale of lead pigments in kegs it charges container differentials, so that the price per hundred pounds, in 50 pound kegs is 25¢ over the price in 100 pound kegs, in 25 pound kegs is 50¢ over the price in 100 pound kegs, and in 12½ pound kegs is 75¢ over the price in 100 pound kegs; but avers that this differential per hundred pounds makes only due allowance for differences in the cost of manufacture, sale and delivery resulting from the different methods and quantities in which such commodities are sold, such as, but not limited to, additional costs incurred in purchasing, filling, and handling the greater number of containers required, per hundred pounds, when sales are made in smaller containers.

For specific answer to sub-paragraph C, the Sherwin-
360 Williams Company denies that it enters into quarterly contracts covering terms of sale and delivery of any lead pigments other than dry white lead. It admits that some of the quarterly contracts negotiated in connection with the sale of dry white lead provide for a price conforming to current published quotations made by it, and that other contracts negotiated for the sale of such products provide for a price at a fixed differential over the then current New York market quotations for common pig lead, but denies that such differentials are based upon the quotations of the American Smelting & Refining Company for common pig lead at New York. It is further admitted that such quarterly contracts establish the grades and qualities of lead pigments covered, the discounts applicable, and the time within which deliveries must be made; but avers that such contracts of this type as it negotiates are entered into as a result of this respondent's individual determination as to the appropriate price and without any direct or implied understanding or agreement of any kind with any of the other respondents herein.

For specific answer to sub-paragraph D, The Sherwin-Williams Company admits that it issues price cards or lists showing quotations on dry white lead, white lead in oil, dry red lead, red lead in oil, and litharge to various classes of customers in various quantities, and admits that such cards or lists are applicable in various geographical areas with price differentials added for areas served by shipping

points other than those using the base or par price; but denies that such cards or lists show delivered quotations on the lead pigments therein referred to, except when delivery is made at one of its many various branch or warehouse shipping points. It avers that such cards and lists affirmatively show that insofar as deliveries are to be made to destinations other than one of its many ship-
361 ping points the price quoted is f.o.b. the shipping point nearest the ultimate destination with the purchaser paying the transportation costs therefrom. This respondent further specifically denies that purchasers, in reselling this respondent's lead pigments, are under any requirement or compulsion to quote or resell such pigments at any price set or fixed by it. It avers, on information and belief, that the delivered prices quoted and obtained by the other respondents in their respective sales of lead pigments are not the same as the delivered costs for lead pigments to its customers, which include f.o.b. prices at many different shipping points plus freight or other carriage costs therefrom to destination.

Paragraph Ten—The Sherwin-Williams Company denies each and every allegation contained in Paragraph Ten of Count I, and demands strict proof thereof.

Paragraph Eleven—For answer to Paragraph Eleven of Count I, The Sherwin-Williams Company denies each and every allegation of said paragraph, including those set forth in sub-paragraphs A through C, and demands strict proof thereof. It also repeats and reasserts herein every denial contained in the foregoing paragraphs of this answer. It further specifically denies that its adoption, use and maintenance of price differentials in connection with shipments made from some of its shipping points as a part of its pricing system or its use of any of the other practices charged in Paragraphs Eight and Nine of Count I of the Amended Complaint produce any of the effects alleged in said sub-paragraphs A through C of said Paragraph Eleven; and further denies that such effects, even if they do in fact, result, which this respondent does not admit, arise by reason of any unlawful activity on the
362 part of this respondent within the purview of the Federal Trade Commission Act.

For specific answer to sub-paragraph B, this respondent avers that it has no inherent advantage over all of its competitors in any territory since its only plant for the pro-

duction of such lead pigments as it sells is located in Chicago, Illinois, where one of the respondents, National, operates a plant for the production of the same lead pigments. It also avers that another respondent, International Smelting & Refining Company, produces dry white lead and white lead in oil at a plant located in East Chicago, Indiana. It also avers that another respondent, Glidden, has a plant at Hammond, Illinois, for the production of some of the same lead pigments.

Paragraph Twelve—The Sherwin-Williams Company denies each and every allegation contained in Paragraph Twelve of Count I, and specifically denies that it has entered into any combination, agreement, or understanding of the character set forth in Count I of the Amended Complaint with any of the other respondents, or that any of its acts, practices, pricing methods, systems or policies are unfair or prejudicial to the public or deprive the public of the benefits of competition, or create discrimination among competitive buyers and users of lead pigments and lead pigment paint, or have any tendency or capacity to unreasonably restrain commerce in lead pigments, or to otherwise hinder, frustrate, suppress, or eliminate competition in such products in commerce, or otherwise constitute unfair methods of competition or unfair acts or practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Wherefore, The Sherwin-Williams Company prays that Count I of the Amended Complaint herein be dismissed as to it.

363 Count II.

Paragraph One—For answer to Paragraph One of Count II, The Sherwin-Williams Company is without knowledge or informatilon as to the reasons for the Commission's belief that it and the other respondents named in the complaint herein have violated the provisions of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, and that a proceeding thereunder is in the interest of the public; but it specifically denies that it has in any way violated any of the provisions of the said Clayton Act as amended by the Robinson-Patman Act, or that this proceeding is in the interest of the public, and demands strict proof thereof.

Paragraph Two—For answer to Paragraph Two of

Count II, The Sherwin-Williams Company avers the various allegations set forth therein are so vague and indefinite as to the character of unlawful discriminations attempted to be charged that it is without knowledge or information as to which of its pricing activities are alleged as constituting unlawful discriminations in price; that such charges, as stated, are conclusions only, and that it is unable to reply definitely and in detail in response to such charges as are stated in said Paragraph Two without the necessary particulars with relation to the specific transactions which form the basis of such alleged violations being furnished to it. This respondent, does, however, expressly deny that it has been, or is, violating Section Two of the Clayton Act or that it is unlawfully discriminating between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead
364 pigments in commerce and demands strict proof thereof.

Paragraphs Three to Five, Inclusive—In answer to the charges stated in Paragraphs Three, Four and Five of Count II, The Sherwin-Williams Company repeats, reasserts and incorporates herein its answer to Paragraphs Three to Five, inclusive, of Count I of the complaint herein as fully as if set forth herein.

Paragraph Six—In answer to the charges stated in Paragraph Six of Count II, The Sherwin-Williams Company adopts and reasserts the statements it has heretofore made in answer to Paragraph Two of Count II and also specifically denies each and every allegation set forth in said paragraph, and demands that prior to the beginning of this case on the merits it be furnished with the particulars as to the specific transactions forming the basis of the charge so stated in Paragraph Six in order that it may answer with respect thereto more specifically, and also demands strict proof of such charges.

Paragraphs Seven, Eight and Nine—In answer to Paragraphs Seven, Eight and Nine of Count II, The Sherwin-Williams Company denies each and every allegation contained in each of said paragraphs, and demands strict proof of each of such allegations. Further in answer to said Paragraphs Seven, Eight and Nine, this respondent repeats, reasserts and incorporates herein its answer to Paragraphs Eight, Nine and Ten of Count I of the Amended Complaint as fully as if set forth herein.

Paragraph Ten—In answer to Paragraph Ten of Count II, The Sherwin-Williams Company admits that when sales are made to purchasers who are located at or near the boundary between two areas served by shipping points
365 using different prices the delivered cost to such purchasers in one area may be higher than the delivered cost to purchasers in the other area, but also avers that there is no substantial competition between dealer purchasers located in one such area with dealer purchasers located in any other such area; and that such differentials in price are not sufficient in amount to have any appreciable competitive effect in any line of commerce. Except as hereinabove admitted, this respondent denies each and every allegation contained in said Paragraph Ten and specifically denies that those purchasers who may be located at or near the boundary of adjoining or contiguous areas served by different shipping points and who may incur different delivered costs are in competition with each other in the sale of this respondent's lead pigments. This respondent admits that its mill net return varies; but denies that the term "mill net return" is comprehended by or included in the meaning of the term "price," as that term is used in Section 2(a) of the Clayton Act as amended.

Paragraph Eleven—In answer to Paragraph Eleven of Count II, The Sherwin-Williams Company denies each and every allegation thereof and specifically denies, except as to differentials applied to shipments from some of its shipping points, that it classifies any of its customers who purchase its lead pigments for resale in any manner or has done so for many years. It avers that all customers who purchase its lead pigments for resale are in a single dealer classification and all dealers serviced by shipping points using the base or par price or using the same differentials added thereto pay the same prices, and that dealer purchasers serviced by a shipping point using the base or par price or a particular differential added thereto are not engaged in competition in any substantial way with similar dealer purchasers serviced by a shipping point
366 not using the base or par price or the same differential. This respondent admits that it has classified certain customers who purchase for use rather than resale, such classifications being as follows:

(1) Contracting painters and large maintenance accounts sold direct

(2) Industrial accounts (including public utilities, privately-owned street railways, petroleum industry)

(3) Railroad and marine accounts

(4) Federal Government, States and Municipalities, and municipally-owned street railways and W.P.A. accounts, and

(5) Small consumers.

It avers that the members of no one of such classifications are competitive, in any way, with the members of any other classification, including the dealer classification, and avers that sales to small consumers are always made by its retail stores as a result of transactions which originate and are completed wholly within the confines of one state.

In applying varying prices to all of such classifications, including the dealer classification, this respondent extends differentials which make only due allowance for differences in the cost of manufacture, cost of selling, and cost of delivery resulting from the differing methods or quantities in which its lead pigments are sold and delivered to such classifications. The Sherwin-Williams Company avers that sales made by it to such purchaser-users who do not buy for resale and who are not competitive with each other do not come within the purview of Section Two of the Clayton Act as amended by the Robinson-Patman Act.

367 Paragraph Twelve — For answer to Paragraph Twelve of Count II, The Sherwin-Williams Company denies each and every allegation thereof, and demands strict proof thereof.

Paragraph Thirteen—For answer to Paragraph Thirteen of Count II, The Sherwin-Williams Company denies each and every allegation thereof, including those set forth in sub-paragraph A which are adopted from sub-paragraphs A, B, and C of Paragraph Eleven in Count I, and also including those allegations set forth in sub-paragraphs B and C of Paragraph Thirteen of Count II. It also repeats and reasserts every denial contained in the foregoing paragraphs of this answer to the various charges stated under Count II, and also repeats and reasserts, insofar as applicable, all of the statements made by it in answer to Paragraph Eleven of Count I, and incorporates such statements by reference the same as if copied herein in full.

Paragraph Fourteen—In answer to Paragraph Fourteen of Count II, The Sherwin-Williams Company denies that it has in any way violated the provisions of sub-section (a)

of Section Two of the Clayton Act as amended by the Robinson-Patman Act.

Wherefore, The Sherwin-Williams Company prays that Count II of the Amended Complaint herein be dismissed as to it.

First Special Defense.

Further answering, and for a first special defense, The Sherwin-Williams Company alleges that its pricing activities which are charged in Counts I and II of the Amended Complaint herein as constituting violations, respec-
368 tively, of the Federal Trade Commission Act and of the Clayton Act as amended by the Robinson-Patman Act were initiated many years ago, and have been pursued subsequently, in a good faith effort to successfully compete, in price and otherwise, with other sellers of lead pigments who were, and are, simultaneously offering for sale and selling to the same classes of purchasers lead pigments of substantially the same grade and quality in commerce, as "commerce" is defined in such Acts of Congress, and in direct competition with this respondent despite the fact that this respondent has been at all times a very small producer and primary seller of lead pigments, and that under such circumstances its pricing activities do not constitute unfair methods of competition or unfair acts or practices within the meaning of the Federal Trade Commission act or unlawful price discriminations under subsection (a) of Section Two of the Clayton Act as amended by the Robinson-Patman Act and are not otherwise unlawful.

Second Special Defense.

Further answering, and for a second special defense, The Sherwin-Williams Company alleges; contrary to the allegations of the Amended Complaint, that any pricing system for standardized products such as lead pigments which results, irrespective of the respective purchasers' distance from the seller's factory or of the relative location of the seller's factory and the factories of its competitors or of other competitive factors, in a uniform net return on
all sales, or any other system substantially different
369 from that used by this respondent as detailed herein, has the necessary tendency and capacity to create territorial spheres of monopoly for some manufacturers,

sellers and dealers within which spheres such manufacturers, sellers and dealers can set or determine, within broad limits, the price at which they are able to sell and still prevent any other competitor having a freight disadvantage from competing in such territory and also has the necessary tendency and capacity to ultimately eliminate the smaller manufacturers, sellers and dealers, such as this respondent, from competition in such commerce and thereby to substantially lessen, hinder, restrict and suppress competition and to create and encourage monopolies, and also has the further necessary tendency and capacity of disrupting, suppressing and eliminating competition among sellers of lead pigments on a national scale or on a large territorial scale all to the detriment and injury of the purchasers of lead pigments and also of the public generally.

Third Special Defense.

Further answering, and for a third special defense, The Sherwin-Williams Company alleges that where its net return from sales of identical quantities to identical classes of purchasers in different competitive areas varies, such variance does not constitute a discrimination in price between different purchasers of a commodity of like grade and quality within the purview of sub-section (a) of Section Two of the Clayton Act as amended by the Robinson-Patman Act and does not constitute an unfair method of competition or an unfair act or practice within the
370 meaning of the Federal Trade Commission Act and is not otherwise unlawful.

Wherefore, The Sherwin-Williams Company prays that the Commission enter an order dismissing Counts I and II of the Amended Complaint in the above-entitled case, insofar as this respondent is concerned.

Respectfully submitted,
Raymond N. Beebe,
James T. Welch,
T. J. McDowell.

Of Counsel:
Davies, Richberg, Beebe, Busick & Richardson,
815 Fifteenth St., N. W.,
Washington 5, D. C.

Dated: May 27, 1946.

1 BEFORE THE FEDERAL TRADE COMMISSION.

In the Matter of National Lead Company, a Corporation, Eagle-Picher Lead Company, a Corporation, Eagle-Picher Sales Company, a Corporation, Anaconda Copper Mining Company, a Corporation, International Smelting & Refining Company, a Corporation, The Sherwin-Williams Company, a Corporation, and The Glidden Company, a Corporation.	Docket No. 5253.

16 Mr. McIntyre: If your Honor please, counsel for the National Lead Company informed me that there are a number of facts alleged in the Complaint concerning which they now stand ready to make certain admissions on the record.

I hand the reporter a statement of such admissions and ask that he copy that statement into the record, and that Mr. Ewing note for the record whether what I have read is correct.

Trial Examiner Ballinger: Mr. Ewing, you are familiar with the copy of transcript handed the reporter
17 by counsel for the Commission?

Mr. Ewing: I am. I wish, however, before making a statement for the record, to have the correction which I have made in this checked by Mr. Bates of The National Lead Company, which will only take a moment.

Trial Examiner Ballinger: The reporter will spread the copy of the transcript handed him by counsel for the Commission on the record.

(Statement copied into the record as follows:

(1) On or about December 8, 1891, Respondent National Lead Company acquired the properties formerly owned by Cornell Lead Co., of Buffalo, N. Y., The National Lead & Oil Co., of New York, N. Y., Atlantic White Lead &

Linseed Oil Company of New York, N. Y., Salem Lead Co., of Massachusetts, The J. H. Morley Lead Co., of Cleveland, Ohio, The Eckstein White Lead Co., of Cincinnati, Ohio, Anchor White Lead Co., of Cincinnati, Ohio, Maryland White Lead Co., of Baltimore, Maryland, American White Lead Co., of Louisville, Kentucky, Kentucky Lead & Oil Co., of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works, of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead & Oil Co., of St. Louis, Missouri, Collier White Lead & Oil Co., of St. Louis, Missouri, and Red Seal Castor Oil Co., of St. Louis, Missouri, together with the following shares of stock
18 in the following companies:

1195 shares Cornell Lead Co.
9993 shares The National Lead & Oil Co., of N. Y.
495 shares Atlantic White Lead & Linseed Oil Co.
670 shares Salem Lead Co.
1995 shares The J. M. Morley Lead Co.
6495 shares The Eckstein White Lead Co.
531 shares Anchor White Lead Co.
295 shares Maryland White Lead Co.
950 shares American White Lead Co.
267 shares Kentucky Lead & Oil Co.
9995 shares Southern White Lead Co. of Illinois
2995 shares D. B. Shipman White Lead Works
9993 shares Southern White Lead Co. of Missouri
2995 shares St. Louis Lead & Oil Co.
993 shares Collier White Lead & Oil Co.
495 shares Red Seal Castor Oil Co.

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock-ownership of which had been owned or controlled by the National Lead Trust.

(3) In February, 1906, Respondent, National Lead Company acquired all of the stock of United Lead
19 Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products.

(4) In February, 1907, Respondent, National Lead Company, acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.). This company never

engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

(5) In March, 1913, Respondent, National Lead Company, acquired all of the stock of the Heath & Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

(6) In March, 1906, Respondent, National Lead Company, acquired all of the stock of the Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915, the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, National Lead Company acquired all of the stock of Bas-Hueter Paint Company; in December, 1917, National Lead Company organized National Lead Company, S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, National Lead Company acquired the properties and assets of Hirst & Begley Company.

20 (8) Respondent, National Lead Company, asserts and represents that the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock, is the most important single factor in its determination and fixing of its price for white lead since pig lead is the principal material used in the manufacture of white lead.)

Mr. Ewing: The statement which Mr. McIntyre has produced is admitted by the National Lead Company and may be taken as facts in this case as far as National Lead is concerned.

Mr. McIntyre: I ask the reporter to mark these documents.

* * * * *

526 PROCEEDINGS.

Trial Examiner Norwood: Come to order, gentlemen. This is a reconvened hearing in Docket 5253, pursuant to the order of the Federal Trade Commission substituting me as Trial Examiner for Hon. James A. Purcell, who had recently been substituted for Hon. Webster Ballinger.

As I understand it, nothing heretofore has been received except exhibits and testimony respecting the same.

The hearing is convened at 10 o'clock a.m., on the 17th

day of June, 1946, in the office of the Federal Trade Commission, Room 332, Washington, D. C.

As I have just come into this case, I think it would be constructive to have an understanding about a few matters here.

I will say that there will be some rules of practice issued. They have been adopted already and I will have some copies for the counsel as soon as possible.

Also, we have a new Administrative Procedure Act, and it is the desire of the Commission, as expressed through these rules of practice, that we conform to the principles of this new Procedure Act, although I think that we have six months or more before that becomes effective, but we shall conform to it in principle as far as we can.

Generally, the Commission expects the Trial Examiner to conduct an orderly and dignified proceeding, and
527 we will try to conform generally to the proceedings of the District Court. I will state that in my hearings, and I think in those of the majority of the Trial Examiners, we permit counsel to remain seated while propounding questions to the witness, but they are expected to rise and be recognized when making objections and motions and statements of ground, and the Reporter is instructed not to record any speeches or statements of counsel which are not made in accordance with that rule.

It is not necessary, and it does not look well, to see someone interrupted in the middle of a question, or in the middle of another counsel's statement, especially when it is some criticism that is shot out from a seated counsel.

Of course, that does not apply to interrupting to make motions and to be recognized.

I think we should also have a clear understanding about off-the-record. Off-the-record consultations will be allowed by the Trial Examiner in the absence of objection, but when they are allowed they are privileged. It would rob the off-the-record consultation of its usefulness if you are permitted to repeat what other counsel have said during this process of reaching an agreement or reaching a compromise, or something like that.

So if you are not willing to consider the off-the-record statements as strictly confidential I ask counsel to
528 please make their objections so we will have notice.

I see by the record that you already understand and counsel have agreed that there is an automatic exception

to every adverse ruling, and that all counsel have the benefit of exceptions of any other counsel.

Copies of the transcript may be procured from the Reporter. I suppose you all know about that.

Miss Reporter, will you note the appearances on there just as if I had announced them.

We are ready to proceed.

Mr. MacIntyre: May we go off the record, Mr. Examiner?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: If Your Honor please, I now ask that there be included in the transcript of record a stipulation between Joseph S. Wright, Trial Counsel of the Federal Trade Commission, and the counsel for the respective respondents, dated May 3, 1946. I pass that up to you so you may see it before it is copied into the record by the Reporter.

Trial Examiner Norwood: Counsel agree to that; do they?

Mr. Ewing: We have all signed it, sir.

Trial Examiner Norwood: Let the record so show.

(The stipulation is as follows):

529 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the undersigned parties hereto, by their respective attorneys, as follows:

That the testimony and evidence heretofore received in the record under the original complaint in this matter, except the testimony of witnesses J. B. Wilson and H. E. White and evidence introduced into said record through said witnesses, may be considered as a part of the record under the amended complaint to the same extent and effect as if such testimony and evidence had been received under the amended complaint, provided however, and it is expressly understood, that all agreements of counsel, rulings

of the Trial Examiner and the Commission, reservations and exceptions appearing in the record are likewise to be considered a part of the record under the amended complaint.

530 Dated, May 3, 1946.

(Signed) Alexander & Green
Attorneys for National Lead Company, a corporation

(Signed) Edmund P. Wood
Attorneys for Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation

(Signed) Chadbourne, Wallace, Parke and Whiteside
Attorneys for Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation

(Signed) Davies, Richberg, Beebe, Busick & Richardson
Attorneys for The Sherwin-Williams Company, a corporation
(Signed) By J. T. Welch

(Signed) John A. Duncan & Roger Hinds
Attorneys for The Glidden Company, a corporation

(Signed) Jos. S. Wright
Trial Attorney, Federal Trade Commission

Mr. MacIntyre: If your Honor please, I ask that there be included in the transcript of the record a stipulation concerning the substitution of Trial Examiners. It relates to the Commission's order of May 21, 1946, naming as Trial Examiner in this case James A. Purcell.

Trial Examiner Norwood: Inasmuch as Mr. Purcell did not sit in this case, what is the use of putting that
531 on the record?

Mr. MacIntyre: Because next will be a question relating to it that I am going to ask counsel for the respondents.

Trial Examiner Norwood: That may be entered in the record.

(The stipulation is as follows):

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the Commission and counsel for the respondents that the testimony and evidence heretofore received in this matter under Trial Examiner Ballinger is to be considered by all parties to the proceeding to the same extent and effect as if such testimony and evidence had been received originally before Trial Examiner James A. Purcell, appointed as substitute Trial Examiner in the Commission's order of May 21, 1946. It is further agreed that in preparing any report on the evidence, or proposed findings or order in this matter, Trial Examiner Purcell may base such report, proposed findings or order upon the tran-
532 script of testimony and evidence heretofore taken and received before Trial Examiner Ballinger, as well as upon the record of testimony and evidence made before Trial Examiner Purcell, subject to the limitations contained in the stipulation between counsel entered into on May 3, 1946.

Dated this 5th day of June, 1946.

(Signed) Chadbourne, Wallace, Parke and Whiteside
Counsel for Anaconda Copper Mining Company and International Smelting and Refining Company, Respondents.

(Signed) Joseph S. Wright
Trial Attorney for Federal Trade Commission.

Mr. MacIntyre: I would now like to ask counsel for the National Lead Company if he has any objection to the substitution of the present Trial Examiner for Trial Examiner Purcell?

Mr. Ewing: None at all.

Mr. MacIntyre: I would now like to ask the same question of counsel for Eagle-Picher.

Mr. Serviss: None at all.

Mr. MacIntyre: And the same question of counsel for Anaconda and International Smelting & Refining Company.

Mr. Gardner: No objection.

Mr. MacIntyre: And The Glidden Company?

533 Mr. Hinds: No objection.

Mr. MacIntyre: And the same question of counsel for Sherwin Williams?

Mr. Welch: No objection.

Mr. MacIntyre: If Your Honor please, we would like to go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: If Your Honor please, I refer to a statement made by you that the record now shows that counsel have an automatic exception without stating it.

I also want to refer in that statement to the understanding that an objection made by one inures to the benefit of others.

I want to state that the understanding in so far as counsel for the Commission is concerned is that that relates only to objections that are made timely. Any raised thereafter do not inure to the benefit of any other counsel.

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: Counsel for the Commission now offer into evidence the document heretofore marked for identification as Commission's Exhibit 580. This exhibit has been identified and authenticated at page 297 of the transcript.

Mr. Ewing: No objection.

534 Mr. Hinds: Is this offer against any other respondent?

Mr. MacIntyre: It is to prove the allegations of the complaint, to prove the zoning system and other matters.

Mr. Hinds: That is objected to as entirely irrelevant, immaterial, incompetent, and in no way shown to have any relationship to the respondent Glidden.

Mr. Wood: I would like to object to this if it is to show the Eagle-Picher practice, because it does not coincide with our map.

Mr. Welch: Objection on behalf of Sherwin Williams to the same effect as made by Mr. Hinds.

Mr. Hinds: It has not been shown that Glidden has ever had any map whatsoever, much less that map.

Trial Examiner Norwood: Is this map any different from the map set out in the complaint?

Mr. Ewing: It is different.

Mr. MacIntyre: Any differences that appear in this map from the one set out in the complaint, and the reasons for the differences will presently appear in the record, and the responsibilities of these respondents for any similarities or differences will also appear in the record before it is closed.

Mr. Wood: Eagle-Picher has stipulated the zone map it has used, and that is already in the record, and that
535 is not our map.

Trial Examiner Norwood: Where did this come from?

Mr. MacIntyre: Pages 297 and 298 of the record disclose the origin of the map so far as we know it, and so far as competent evidence has shown it.

Before the record closes, we will be able to point to the record so far as each individual respondent is concerned, so far as the similarity of any zoning practice of theirs to this map.

Mr. Hinds: My understanding is that the objection extends not only to a complete absence of connection between the map and the other respondents, but a complete lack of identification which will in any way bind any other respondent, so it is as though it were pulled out of a hat so far as we are concerned.

If I am mistaken, I will be glad to be corrected.

Glidden has pleaded it has not used any map in its business. We have not stipulated that is an authentic map even as to National Lead, as to which we have any knowledge.

Trial Examiner Norwood: Is this map connected with any respondent?

Mr. MacIntyre: It was obtained from an official of the National Lead Company, and, as to the proof asked for by Mr. Hinds, we will be able to furnish that from the sum total of evidence in the record before the record is closed.

536 Mr. Hinds: What evidence is there in the form of a stipulation or otherwise as to Glidden, that it is taken from National Lead Company's files, or has any existence whatsoever.

As to our own records, I believe we have made a stipulation as to authenticity, reserving other objections, but as

to other respondents' records, I don't understand we have done so, but the competency would have to be shown either by our stipulation or extensively.

Mr. Gardiner: On behalf of Anaconda Copper Mining Company and International Smelting & Refining Company, I object to the introduction of this exhibit on the ground that it is incompetent and irrelevant, and has no application as to those two respondents.

Trial Examiner Norwood: I thin we will have an understanding as to these various bits of evidence coming in, and as connected up with one or more of the respondents; an understanding as to the effect upon the other respondents.

There is no use of making formal objections to a bit of paper in order to save yourselves and the record, because you may have an understanding that no evidence is to be considered against any respondent until it is connected up by competent evidence, and until it can be logically and legally applied to that respondent.

Of course, if conspiracy may be properly inferred
537 from the whole record, then this evidence against one becomes evidence as against the others. But it is not taken as against any respondent until that is found from the entire record.

This evidence is received for all purposes as may appear.

Mr. Hinds: May I ask a question?

Does that apply where the evidence of competency—we are not talking about materiality or relevance—but where the evidence of competency consists solely of a stipulation in this proceeding of one respondent that this is indeed taken from their files?

As I understand the conspiracy rule, a stipulation in this proceeding by one respondent that the document was taken from its files would not be evidence even as against an alleged conspirator of that fact. It would have to be evidence as to each and every—

Mr. MacIntyre: I certainly do not agree to that statement.

Trial Examiner Norwood: Whatever its value and whatever its inferences may be logically, properly, and legally drawn from it may be applied to other respondents if and when conspiracy is shown.

I can't tell you what weight is there until you have

stated the circumstances, but whatever it is and how-
538 ever it may be applied to the particular respondent connected with it, it will not be applied to the others until connection is made.

We needn't waste any time saving the same objections on those things where the testimony or the document does not purport to apply to your particular client. We will have that understanding, that it is not to apply to it until logically and legally it may be applied.

I will overrule the objections and receive Commission's Exhibit 580.

I have not had an opportunity to verify this fully, but I am taking the statement of counsel that it is identified properly and connected, and if it appears not to be such I will entertain a motion to strike it.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 580," was received in evidence.)

Mr. MacIntyre: We now offer into evidence Commission's Exhibit, for identification, 581-A through E—this is in photostatic form—as a statement of the pricing policies of respondent National Lead Company, under date of January 26, 1937, and as it appeared when found in the files of respondent Eagle-Picher.

Trial Examiner Norwood: Any objection?

Mr. MacIntyre: I want to say that the identification of it is shown by the record, page 298 and page 299.

539 Mr. McDermott: Mr. MacIntyre, did you mean National Lead Company?

Mr. MacIntyre: It is a statement of National Lead and was found in the files of respondent Eagle-Picher.

Mr. Hinds: As to respondent Glidden, the same objection is made as was made to the previous offer, the same grounds.

Mr. Wood: This was found in the Eagle-Picher file. I do object to the manner of the identification as a document file in our files showing the pricing policies of the National Lead Company.

The document shows on its face what it is, and it is interpretation to say it shows the pricing policies of the National Lead Company.

I object to the characterization but not the authenticity of the exhibit, or what is shown on its face.

Mr. Ewing: On behalf of National Lead, I object, be-

cause there is nothing to show how these papers reached the files of Eagle-Picher or that they emanated officially from National Lead in any way, shape, or form, and there is nothing except as shown in the papers themselves to connect National Lead with them, nor is any price policy of National Lead published in those documents.

Trial Examiner Norwood: Are there any further objections?

540 (No response.)

Trial Examiner Norwood: What is the purpose of this?

Mr. Ewing: I call your attention to the fact that the specimen is endorsed on those papers, or some of them, that would perhaps indicate something with respect to their authenticity.

Trial Examiner Norwood: I understand this is identified as having been found in the files of the Eagle-Picher Company. Is that correct?

Mr. MacIntyre: The transcript, pages 298 and 299, show that fact.

Mr. Ewing: But nothing shows how they got there, where they came from, who issued them, who published them, or anything like that.

Trial Examiner Norwood: If one respondent has the price list with sales information, and so on, of another respondent here—

Mr. Ewing: There is nothing to show, Your Honor, that it is a price list with sales information.

Trial Examiner Norwood: Well, it is whatever it is. One respondent has material which another respondent has evidently issued.

I think we shall have to let material of that kind come in for study. If it is not connected up, it will just
541 be pitched out, but in a case like this we shall have to receive this sort of information.

I overrule the objection and receive the exhibit.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 581-A, 581-B, 581-C, 581-D, and 581-E," was received in evidence.)

Mr. MacIntyre: We now offer into evidence documents heretofore marked for identification as Commission's Exhibit 582-A, B, C, and D, a statement by Fred McCarthy of National Lead Company, to Harold Rowe, vice-president of that company, under date of January 18, 1944, concern-

ing the marketing practices and pricing policies of National Lead Company, and some showing as to what those practices and policies were with respect to zoning and price discrimination.

Mr. Hinds: For Glidden, the same objection as made to previous offers of documents.

Trial Examiner Norwood: This is inter-office material, isn't it, or is it?

Mr. Ewing: I believe that is material which was prepared—I will check it—at the request of the Commission's investigator.

The letter consisting of two pages, marked Commission's Exhibit 582-A and 582-B, for identification, is an inter-office memorandum prepared by Mr. McCarthy of National Lead Company following the request of the
542 Commission's investigator, Mr. Dunn, and similarly the chart, Commission's Exhibit 582-C, is a chart prepared by National Lead Company in compliance with the investigator's request, and Exhibit 582-D is a map, or a description, also prepared at the request of the investigator and referred to in Comimssion's Exhibit 582-A and B.

National Lead, however, objects to the relevancy or competency of the exhibit.

Mr. Hinds: On behalf of Glidden, I would like to expand my objection so as to include the point that not only would this have to be connected up later under the conspiracy rule, but there would have to be some evidence of the fact which counsel has conceded as against National Lead Company but which has not been conceded by Glidden to be a fact, and a statement of one counsel as to what he concedes to be the facts is in no way binding on other counsel, and we ask to have it connected up as to whether or not they are facts.

Trial Examiner Norwood: That may be on the same basis as other evidence. One counsel's admission would be on the same basis, would it not?

Mr. Hinds: I think not. I think a respondent's admission outside of court might, under the conspiracy rule, be binding on the other respondent, but certainly we are not here alleged in court to be conspiring.

Mr. MacIntyre: If Your Honor please, it takes
543 a higher status than the ordinary statement of counsel in that respect because here we have stipulations by all counsel conceding a statement made by any counsel relating to authenticity and identification.

Mr. Ewing: I made no statement as to the authenticity of the contents of the document. I stated they were prepared by National Lead in response to the Commission's request. I make no concession as to the authenticity or accuracy.

And if I might refer to the exhibit Your Honor ruled on before, the one produced from Eagle-Picher's files, I would like to call attention to the Commission investigator's testimony at page 300 of the record, and it clearly appears in the record that nobody knows where the documents came from and how they got in Eagle-Picher's files.

I would like to renew that objection and ask that you strike the exhibit.

May I read that to you off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: Under those circumstances, I renew my objection, and ask that the exhibit be stricken.

Mr. MacIntyre: If Your Honor please, with further reference to page 300 of the record, I want to say that counsel for the Commission is relying quite strongly
544 upon what is shown on page 300 of the record, and, as is frequently the case in conspiracies such as the one we are here dealing with, conspirators are caught with evidence that they do not recall and cannot state how it came into their possession, but nevertheless it is germane to the issue involved.

This is just another instance of that kind.

Mr. Ewing: I move to strike Mr. MacIntyre's remarks as to conspirators and conspiracies here. That is what he is trying to establish.

Trial Examiner Norwood: I don't think he is making any fresh charges. I am sure he is not.

Mr. Wood: If Mr. MacIntyre is counting on that so heavily, I would like to see its title changed. He gave it the title, when he introduced it, as showing National's price policy in Eagle-Picher's files.

As I pointed out before, that title is entirely Mr. MacIntyre's interpretation, and if that appears in the index it is going to appear as having been proved as showing National's price policies where it is not proved at all.

Mr. MacIntyre: I didn't say it would show National's policies. I said it shows a statement by National as to its policy.

Mr. Ewing: It does not show a statement by National at all until you prove it came from National.

545 Mr. Wood: Would it be possible to have the stenographer read Mr. MacIntyre's remarks in offering that exhibit? I want to be sure I heard it correctly, myself.

Trial Examiner Norwood: I don't know if we could find it, or not. Much water has gone over the dam since then.

Mr. Wood: I think Your Honor has my point, that I object to these things being interpreted by the title given to them.

Mr. Hinds: I would like to explain Glidden's objection to this extent: My understanding is that there has appeared in this case as an undisputed fact, the fact that there is no allegation of conspiracy continuing after January 1, 1946.

Under those circumstances, even though it were not otherwise true,—and I believe it would be,—a statement of counsel having been made in the course of the proceeding, having been made after the date that the alleged conspiracy is conceded to have terminated, can have no effect on any of the other respondents, so it will not stand as against any of the other respondents.

Nor could that lack be supplied by showing the existence of a conspiracy.

Trial Examiner Norwood: I think we have quite a hill to climb before we get to that.

Mr. Ewing: I don't think Your Honor has ruled
546 on my renewed objection or motion.

Trial Examiner Norwood: I want to hear Mr. MacIntyre's statement about this 582-A to D.

What is the purpose of that?

Mr. MacIntyre: It is evidence of statements made by officials of respondent National Lead Company as at the date of January 18, 1944—I believe that is it—as to some policies and practices of National in marketing and pricing white lead.

Trial Examiner Norwood: This was furnished by National to the Commission?

Mr. MacIntyre: Yes. It is a statement by its officials concerning its practices.

Mr. Hinds: Glidden insists there is no evidence that this was a statement furnished by National Lead to the

Commission. It is evidence as against National Lead that that is a fact because counsel for National Lead is here and admits it, but an admission by counsel for a co-conspirator, particularly after the conspiracy is admitted to have ceased, is not evidence against the others.

Trial Examiner Norwood: It would not be taken as establishing a conspiracy.

Mr. Hinds: It may not be taken for any other purpose.

Trial Examiner Norwood: It might be taken for
547 many other purposes.

Mr. Hinds: Even if a conspiracy is well established it still lacks competency because it is not alleged we are now conspirators. Therefore, a statement by counsel for one conspirator does not in any way affect the others.

Mr. MacIntyre: Mr. Hinds suggests, and would like for us to conveniently overlook the overt act of January 18, 1944, in the form of a declaration and statement by an official of National which is evidenced by this exhibit.

Mr. Hinds: I think there might be some point if there was competent evidence that a declaration of that sort had been made, but there is no such evidence as to us. There is merely an admission by counsel for National Lead that such a declaration may be made.

Trial Examiner Norwood: I think we may receive evidence of a continuation of an unfair practice of any sort, a continuation after the complaint as to what happened before the complaint. If nothing was proven to have been employed, no unfair practice proven to be employed prior to the date of the complaint, nothing thereafter would be counted against the respondent, but if there were you could consider matters that happened after that.

I shall overrule both motions and receive this Commission's Exhibit 582-A through D.

(The documents heretofore marked for identification
548 "COMMISSION'S EXHIBITS NOS. 582-A, 582-B, 582-C, and 582-D," were received in evidence.)

Mr. Ewing: I don't believe Your Honor has ruled on the record with respect to my motion with respect to Commission's Exhibit 581.

Trial Examiner Norwood: I said both objections on both motions.

Mr. MacIntyre: If Your Honor please, I offer into evidence the document heretofore marked for identification as Commission's Exhibit 583. I offer that as evidence of a statement made and declared by an official of National

Lead Company concerning the zoning practice of pricing white lead.

Mr. Ewing: I move to strike out Mr. MacIntyre's characterizations of the paper when he offers it, and I suggest it would save similar objections and magnifying of the record if he would refrain from the characterizations of these documents and let them speak for themselves if and when Your Honor receives them.

Trial Examiner Norwood: I would rather prefer he indicate the purpose.

Mr. Ewing: I have no objection to that, but when he puts his label on it—

Trial Examiner Norwood: That is not taken as evidence.

Will you read the statement, please.

549 (The Reportor read the record.)

Mr. Ewing: He says he offers it as a statement made and declared, and there is no such statement in the record.

Mr. MacIntyre: If Your Honor please, I merely refer to page 389 of the record, which is to the effect that officials of the National Lead Company described this document as a zone map and during the course of a discussion that they had at the time with a representative of the Federal Trade Commission when he was discussing with them an investigation the Commission was making concerning the uniform practice of the industry of selling white lead in oil on a zone basis.

Trial Examiner Norwood: Have counsel any further objection?

Mr. Ewing: I would like to direct Your Honor's attentio to the witness' testimony where he produced this map for identification, and he said:

"Well, this is what is called a zone map by Messrs. Carroll and Reque. I had already told both of those gentlemen that the Commission's investigation concerned the apparently uniform practice in the industry of selling white lead in oil on a zone basis."

That is Mr. Carmichael's statement, the investigator's statement.

Trial Examiner Norwood: It is objected to on the ground of the characterization.

550 Mr. Ewing: I simply objected and wanted to bring up the subject of characterization because I think if characterizations continue we are going to continue to ob-

ject and there will be an awful lot of time wasted and the record will be cluttered.

Mr. Hinds: The same objection as heretofore on behalf of Glidden.

Mr. Ewing: And I object to the document itself.

Trial Examiner Norwood: I want to state to counsel that no such characterization by any attorney of anything that is offered here to go into evidence is going to influence me in any way or any manner whatsoever.

I would like for counsel to characterize it in some way that will indicate to me its general purpose, and I will ask Commission's counsel to be guarded in respect to his characterizations, to keep them well within what they may properly be said about them.

Mr. MacIntyre: If Your Honor please, I merely referred to what the evidence shows concerning this in bringing to your attention what the record does show as the offer was made, and, of course, if counsel are going to persist in making their objections I will merely refer to that portion of the record so that you may, through that reference, find the evidence instead of my mentioning it, because it is in the transcript at pages 389 and 390 to the precise
551 effect that I have heretofore stated.

Mr. Ewing: I would like to have Mr. MacIntyre's last statement read back where he states what the record shows.

Trial Examiner Norwood: Can you find it, Miss Reporter.

(The Reporter read the record.)

Mr. Ewing: Before I read, Your Honor, on page 389 what the witness said as to the map, Mr. Hinds moved to strike and the Trial Examiner overruled the objection and denied the motion and stated the witness might state what he stated to the representative of the company.

I continue:

"Answer (Continuing). Both Messrs. Carroll and Reque admitted that that was an industry practice and the practice of their own company.

"Mr. Hinds: Move to strike that out.

"Mr. Ewing: I move to strike that out.

"Trial Examiner Ballinger: That motion is granted. The answer is stricken."

So there is no such evidence in the record.

Mr. MacIntyre: Mr. Ewing is not reading lines 1 to 15 on page 390 where I persisted in the line and then contin-

ued to get some additional evidence, but I think we are wasting time referring back to that.

552 Trial Examiner Norwood: I think we had better direct our attention to these papers, themselves. Attorneys will make claims. They are not taken by me in any way as evidence.

Mr. Gardiner: On behalf of Anaconda Copper Mining Company and International Smelting & Refining Company, I object to the introduction in evidence as having no relevancy, competency, or bearing as to those two respondents.

Trial Examiner Norwood: Mr. MacIntyre, will you explain to me what this map is?

Mr. MacIntyre: I have just done so on the record. Witness Carmichael has testified that it is what officials of respondent National Lead Company called a zone map, and they did so during the course of the discussion that he had with them concerning an investigation being made by the Commission of a uniform practice in the industry of selling white lead in oil on a zone basis. That is page 389.

The record also shows that these officials of the National Lead Company gave this document to the witness as showing the manner in which the practice was carried on. That is at lines 6 to 8, page 390, of the record.

Trial Examiner Norwood: Did Mr. Carmichael give any further information about it, and was he cross-examined about it, and so on?

Mr. Ewing: He was only there to identify the 553 documents. At that time the hearings were restricted to the identification of documents and corporate history, and there was no cross-examination with respect to the merits in any way, shape, or form.

Mr. MacIntyre: I assume National Lead Company has a lot more that they could tell us about that, and they will probably do so before the record is closed.

Mr. Ewing: I move to strike that as an unwarranted statement.

Mr. MacIntyre: They made it up. We don't know what was in their minds when they made it up. They will have to tell us.

Mr. Ewing: I still move to strike that, in addition to the other.

Trial Examiner Norwood: The objection is allowed. I will have to know more about that. I will have to look the record up.

Mr. MacIntyre: In that connection, I refer Your Honor to pages 389 and 390.

Trial Examiner Norwood: I thank you for that.

Mr. MacIntyre: I believe the discussion goes over to page 391.

Trial Examiner Norwood: We will have a five-minute recess.

(There was a short recess taken in the hearing.)

554 Trial Examiner Norwood: The hearing will come to order.

Mr. MacIntyre: If Your Honor please, I now offer in evidence Commission's Exhibit, for identification, 584-A and 584-B as a statement by an official of National Lead Company concerning its marketing and pricing practices of white lead.

Mr. McDermott: What page in the record is the reference?

Mr. MacIntyre: The reference in that connection is made to the record, page 305.

Mr. Ewing: As far as National is concerned, other than the characterization, this 584-A is a note to the investigator, Mr. Dunn, and 584-B was the document supplied him.

Mr. Hinds: On behalf of Glidden, I make the same objection as heretofore, and I find that accuracy now requires that I withdraw a portion of the previous objection that I made in so far as I said that the statements of co-counsel respecting authentically are not competent against the other respondents.

I withdraw my objection because I find I have stipulated the contrary.

I make the same objection with respect to this document on behalf of Glidden.

Mr. MacIntyre: If Your Honor please, the stipula-
555 tion Mr. Hinds is referring to begins at page 8, line 20, and continues following through page 10 of the record.

Trial Examiner Norwood: Yes. I have read that. I agree with counsel about that.

Exhibit, for identification, 584-A and B is received in evidence. The objections are overruled.

(The documents heretofore marked for identification "COMMISSION'S EXHIBIT NOS. 584-A and 584-B," were received in evidence.)

Mr. MacIntyre: I would like to offer in evidence Com-

mission's Exhibit 655-A, B, and C, which purports to be the prices of pig lead of the American Smelting & Refining Company at New York over a period from February 27, 1930, through July 6, 1938, and of white lead in oil, October, 1929, through January, 1942, which is identified in the record at page 392.

Mr. Ewing: National Lead will concede the three documents marked for identification Commission's Exhibits 655-A to C, procured by the Commission's investigator from officials of the National Lead Company, but makes no concession with respect to the accuracy of the statements contained in the document.

Trial Examiner Norwood: Are there any further questions or objections?

Mr. Hinds: The same objection as heretofore made 556 on behalf of Glidden.

Trial Examiner Norwood: I don't think he made an objection. He simply qualified his identification of the document.

Do counsel object to the document?

Mr. Hinds: Our objection now does not go to the accuracy of the statement that counsel for the National Lead Company has just made because I agree that we have stipulated we are accepting counsel's statement as to the authenticity.

My objection goes as to relevancy and materiality as affecting this other respondent.

Mr. Wright: With reference to Mr. Ewing's statement, the exhibits have been already identified in the record. We are not asking him to make any further concession about identification.

Trial Examiner Norwood: The objection is overruled. The exhibits will be received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 655-A, 655-B, and 655-C," were received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 656-A and B, which are lists of price changes, terms of sales and discounts over a period from 1930 through January, 1944, of the National Lead Company, which are identified at page 394.

557 Mr. Ewing: National concedes that these two documents, 656-A and B, were supplied the investigator by it, but makes no concession with respect to the accuracy thereof.

Trial Examiner Norwood: They will be received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 656-A and 656-B," were received in evidence.)

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 657, which is a list of price changes on white lead in oil and on dry white lead of the National Lead Company, together with the dates the notices of changes were mailed, and the dates they became effective, and the prices which were effective, and, in that connection, I would like to point out that this document was erroneously identified on page 332 of the transcript as Commission's Exhibit 658.

It is obvious from the transcript it is Exhibit 657, that the witness was referring to, and I would like counsel for the respondents to agree that the record may be changed.

Mr. Ewing: That is correct.

Trial Examiner Norwood: I will ask counsel to list that as a correction to the record to be later entered in accordance with the rules of practice.

What we have said here and agreed to is all right, 558 but to make sure that we can find those corrections, and that we proceed according to the rules of practice, I just ask you to make note of that to be on a list to be submitted later.

I accept the correction to the record.

Mr. Ewing: National Lead has no objection.

Trial Examiner Norwood: It will be received and marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 657," was received in evidence.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibits 659-A through Z-51, which are price lists, terms of sale and delivery prices on lead pigments as made and announced by the National Lead Company to its customers over a period from approximately 1922 to 1942.

I might add that this was the subject of a stipulation as to identification in the record at pages 256 to 261.

Trial Examiner Norwood: Any objection?

Mr. Ewing: No objection.

Thial Examiner Norwood: It is received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 659-A, 659-B, 659-C, 659-D, 659-E, 659-F, 659-G, 659-H, 659-I, 659-J, 659-K, 659-L, 659-M, 659-N, 659-O, 659-P, 659-Q, 659-R, 659-S, 659-T, 659-U, 659-V, 659-W, 659-X, 659-X-1, 659-Y, 659-Z, 659-Z-1, 659-Z-2, 659-Z-3, 659-Z-4, 659-Z-5, 659-Z-6, 659-Z-7, 659-Z-8, 659-Z-9, 659-Z-10, 659-Z-11, 659-Z-12, 659-Z-13, 659-Z-14, 659-Z-15, 659-Z-16, 659-Z-17, 659-Z-18, 659-Z-19, 659-Z-20, 659-Z-21, 659-Z-22, 659-Z-23, 659-Z-24, 659-Z-25, 659-Z-26, 659-Z-27, 659-Z-28, 659-Z-29, 659-Z-30, 659-Z-31, 659-Z-32, 659-Z-33, 659-Z-34, 659-Z-35, 659-Z-36, 659-Z-37, 659-Z-38, 659-Z-39, 659-Z-40, 659-Z-41, 659-Z-42, 659-Z-43, 659-Z-44, 659-Z-45, 659-Z-46, 659-Z-47, 659-Z-48, 659-Z-49, 659-Z-50, 659-Z-51," were received in evidence.)

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 615-A through D, quotations and price announcements by the National Lead Company to its customers as of April 26, 1941, covering quotations to railroads, steamship lines, industrial accounts, Government, State and municipal accounts, covering lead pigment in general.

Trial Examiner Norwood: Any objections?

Mr. Ewing: I object to the characterization. They are not notices of prices issued to customers, but there is no objection as far as National is concerned to the documents as such.

Trial Examiner Norwood: I thought he was very 560 discreet in his characterization there.

Mr. Ewing: I thought he was, too, but when he referred to customers I would have to take exception.

Trial Examiner Norwood; Any further objections?

(No response.)

Trial Examiner Norwood: The exhibits will be received as marked. The characterization will be disregarded as weighing the testimony.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 615-A, 615-B, 615-C, and 615-D," were received in evidence.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I want to offer in evidence Commission's Exhibits 613-A through C, which is form of agency contract between the National Lead Company and retail dealers covering a sale of white lead in oil. It is identified at page 320 of the transcript.

Mr. Ewing: National has no objection to the receipt in evidence of the document, but, of course, it is not bound by the description.

Trial Examiner Norwood: It will be received as marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 613-A, 613-B, and 613-C," was received in evidence.)

561 Mr. Wright: If Your Honor please, I wish to offer in evidence Commission's Exhibit 623-A through C, identified at page 327 of the record, consisting of confidential price lists of the National Lead Company applicable to zones 1, 2, and 3 as of October 1, 1943.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NOS. 623-A, 623-B, 623-C," was received in evidence.)

Mr. Wright: Your Honor please, I wish to offer in evidence Commission's Exhibit 624-A through C, consisting of a form letter from National Lead Company of its agents, and attachment showing the prices and terms of sale and a memorandum attached to it by one of the dealers which is identified at page 328 of this transcript.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I have no objection with respect to the documents now marked Commission's Exhibits 624-A and B, for identification.

I do object to the receipt in evidence of the document marked Commission's Exhibit 624-C, for identification, on the basis of the testimony introduced on behalf of the Commission at page 330, from which it appears that this purports to have been a transcript of a statement made

562 by a man named Diement to Attorney-Examiner R. T. Dunn, there being no evidence in the record at all with respect to who Diement is, what connection, if any, he has with the National Lead or any other respondent.

I therefore submit that the document should be excluded.

Mr. MacIntyre: If Your Honor please, we submit that the connection between respondent National and this party Diement, from whom this document was secured, is said by National to be the relationship of principal and agent.

On the basis of that statement by National, the statements made by Diement to a representative of the Commission in the submission of this document to a representative of the Commission, are binding on National as a

respondent here, being made as they were by what National claims to have been its agent.

If, when the record is finally closed, that relationship is found to have not existed, then the document is admissible on other grounds, namely, that of a statement by a co-conspirator with the National in attempting to maintain prices named by one of the respondents here, and a member of the conspiracy here, namely National. He is either an agent or a co-conspirator, and it is admissible on those grounds.

Mr. Ewing: The only trouble with that is that there is nothing in the record to show who Diement is. I
563 made the same objection in Cleveland, I believe it was, when the document was marked for identification. We never claimed he was our agent, so far as this proceeding was concerned. I don't know if he is or not.

Mr. MacIntyre: If he isn't an agent he is a co-conspirator.

Trial Examiner Norwood: If he is not your agent—

Mr. Ewing: There is nothing to show who he is. You can't claim he is an agent or co-conspirator. That is not being charged. There is no statement in the record that he made the statement in the course of its agency. If they want the document in I think they should show who Mr. Diement is.

Mr. MacIntyre: The record that has been cited by Mr. Wright clearly shows who Mr. Diement is. Unfortunately, the record has his name spelled B-e-e-m-o-n-t. But the statements made by Diement to a representative of the Commission long before the complaint issued in this case, are to the effect that he was an agent of National and the documents, as well as other information which has been secured from National, are to the effect that National is holding up Diement to be its agent.

I am not so sure when the record is closed whether it will show Diement is an agent at law and in fact, or a co-conspirator, but whether it be one or the other it is my
564 contention that the document is admissible against National.

Mr. Ewing: I submit there is no proof in the record because the Commission's investigator says that Diement may have told him he was or was not an agent. And certainly there is no basis for the statement he was either an agent or a co-conspirator. He might be most anybody. Let him show who he is.

Mr. Hinds: On behalf of Glidden, I enter the other objection, and add the further objection that even if the declarations of the alleged agent as to the fact of his being an agent were competent—it, of course, is not under the well known rule—even then there is a complete failure of sustaining the burden of proof by the Commission to make this evidence competent in that there is no showing that the admission was made in the course of the then business entrusted to the agent. It appears it was an alleged declaration as to some past event.

Agents have no authority to make admissions binding upon their principal as to narratives of the past. At the most they can only speak contemporaneously with respect to business then being transacted.

Mr. MacIntyre: On that point, I merely refer Your Honor to briefs which have been filed on that point, both pro and con, concerning statements made by another agent of the respondents, namely, an official of Eagle-Picher.

565 Those briefs are in the record, if Your Honor desires to examine the authorities and they concern the admissibility of a statement by that agent, namely, Mr. Maston.

Mr. Wood: Even if Mr. Diement, whoever he is, said that he was both an agent and a co-conspirator, it still would not be admissible at this time. I don't care what Mr. Diement may have said.

Trial Examiner Norwood: I want to know a little more about this Mr. Diement. I will reserve my ruling on 624-C.

Mr. MacIntyre: If Your Honor please, I refer you to the record beginning at line 17, page 329 of the record, and continuing through line 20, page 332, and making the correction as you read it from Beemont to Diement. The reporter made a mistake there.

Mr. Ewing: Your Honor, we go on from the bottom of page 331 to the top of page 332.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Make your statement on the record.

Mr. MacIntrye: I would agree to this understanding concerning the pending offer—

Trial Examiner Norwood: That is Exhibit 624-C?

Mr. MacIntyre: Yes, sir; the Diement document.

566 Trial Examiner Norwood: Very well.

Mr. MacIntyre: That it be received at this time subject to the understanding we will connect Diement with the National Lead Company, or other respondents, either as an agent under their so-called agency plan, or as a co-conspirator before the record is closed.

Mr. Ewing: I can't accede to that, Your Honor. If he is simply connected as a selling agent there is no basis for its reception against us. He must establish he was an agent acting within his authority when he wrote that document.

Trial Examiner Norwood: I will construe it that he is to show that Mr. Diement is such an agent as to bind this principal by an admission.

The objection is overruled, and with that understanding Commission's Exhibit 624-A to C is received in evidence.

Mr. McDermott: That is a condition?

Trial Examiner Norwood: Yes, sir; as to 624-C.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS Nos. 624-A, 624-B, and 624-C," were received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 531-A and B, which is a copy of a letter from the vice-president of John T. Lewis & Bro-
567 thers Company to Harold Rowe of National Lead Company, and an enclosure in the form of a letter from the Eagle-Picher Sales Company to its distributors on its agency plan. That is on page 145.

The John T. Lewis Company is a wholly-owned subsidiary of National Lead Company.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS Nos. 531-A and 531-B," were received in evidence.)

Mr. Ewing: But National, of course, makes no concession with respect to the contents and authenticity of 531-B.

Mr. Wood: And Eagle-Picher makes no concession as to authenticity.

Trial Examiner Norwood: Very well.

Mr. Wright: I would like to offer in evidence Commission's Exhibit 713, which is a statement by officials of the National Lead Company as to the freight rates on white lead between various points identified at page 334 of the record.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received and marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT No. 713," was received in evidence.)

568 Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 714, a statement by the manager of the Buffalo branch of National Lead Company, of the freight rates on white lead in oil between various points identified at page 324 of the record.

Mr. Hinds: If and in so far as this is offered as showing freight rates generally, as being on Glidden, the objection is made that there is no issue in this case between the Commission and Glidden as to the effect that Glidden's sales within a given so-called zone, district, are uniform. As to that the matter is not in issue at all. Therefore, it is not relevant.

Mr. MacIntyre: The relevance and materiality of the differences on these freight rates go to and spring from the issues that these respondents systematically subsidized distance shipments for the benefit of distance customers to the disadvantage of neighboring customers of lead pigments under their present method of pricing and the precise amounts of that subsidy and the oppressive character of it as shown through these freight rates.

In other words, we will get into the precise amount of the burden through these exhibits.

Mr. Hinds: I think counsel has missed the point of my objection. He is arguing that the issue, if it existed, would be material. I say it is not in issue because Glidden

569 has admitted its prices within a zone are uniform. That is putting in evidence something that is in evidence in the answer.

Trial Examiner Norwood: I remember that in your answer, but it is not in the other answer.

Mr. Ewing: I object to this document for identification on the ground that if they are attempting to prove freight rates it is not the best evidence. I know nothing about the accuracy of it.

570 And on the further ground it on its face shows it does not relate to any sales, and on the further ground, in view of Mr. MacIntyre's statement in answer to Mr. Hind's objection, that price is not defined under the Robinson-Patman Act in the matter which Mr. MacIntyre specifies.

Trial Examiner Norwood: That is a legal question between you.

Did you want to say something, Mr. Wright?

Mr. Wright: Your Honor, these have been identified as statements of freight rates which were supplied by officials of the National Lead Company to the witness at page 334. It certainly seems they are competent as the rates which the National Lead Company was using in that branch at that time.

Mr. Ewing: There is no indication they were using them.

Trial Examiner Norwood: Who is Mr. McCarthy?

Mr. Wright: Mr. McCarthy is manager of trade sales of National Lead Company.

Trial Examiner Norwood: At the New York office?

Mr. Wright: That is right.

Trial Examiner Norwood: It may be received and marked. The objection is overruled.

571 (The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 714, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Exhibit 714 has been received. Proceed.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 715-A and -B, which is a statement by the manager of the Cincinnati branch of the National Lead Company of freight rates between various points, and routing and—

Mr. Hinds: Is this offered as evidence of freight rates or is it offered as evidence of some internal business of the National Lead Company?

If it is offered as evidence of freight rates, I object to it.

Mr. Wright: It shows on its face to be a statement of the freight rates applicable at that time to the business of that branch of the National Lead Company.

Mr. Ewing: I object on the same grounds that I objected to the offer of 714 for identification, including again specifically the ground that if this is offered as evidence proving freight rates, then it is not the best evidence.

572 Mr. Hinds: Certainly it is hearsay evidence of freight rates as against The Glidden Company, assuming freight rates are at issue at all—which they are not.

Trial Examiner Norwood: Do you offer to show what the freight rates were?

Mr. Wright: It is offered to show what the National Lead Company said the freight rates were between those points at that time.

Trial Examiner Norwood: Is this a differential they were including in the price?

Mr. Ewing: No, sir. It purports to be a statement of rates between certain points on certain commodities, specific commodities. It was given at their request as prepared information. It is as though they had gone to the Interstate Commerce Commission and asked for such a statement.

Mr. Wright: It is apparent from the background of that and the document itself, that it is a statement of the freight rates which were applicable to the shipments by the National Lead Company, Cincinnati office, at that time.

Trial Examiner Norwood: Is there anything here to show that National at this time was going by these figures?

Mr. Wright: Certainly.

Mr. Ewing: It does not prove we were going by the figures. They asked for a compilation of freight rates
573 and we apparently got the information and gave it to them, but there is no proof of any sale or anything.

Mr. Hinds: Suppose it were the mileages between the various cities and the Commission asked National Lead to prepare a list of mileages. As against Glidden, that is not evidence of the mileages.

Mileages, if material, must be proved by some other means.

Freight rates are generally accessible to anybody but what one respondent says are the facts is inadmissible against us.

Mr. Ewing: There is nothing to show any sale has any relation to this document which was never used in our business and was prepared for the Commission.

Mr. Wright: I think an inference can be drawn from the fact that the National Lead Company made a statement that those were the freight rates applicable on shipments from its branch office in Cincinnati to those points, that these were the rates applicable to shipments of National at that time from that branch.

Trial Examiner Norwood: Those were the figures they were using?

Mr. Ewing: There is nothing to show that we used them.

Mr. Wright: Look at this paragraph, "To give a
574 complete picture we list rail and truck rates on white lead-in-oil in kegs reported to us as of today."

Trial Examiner Norwood: If you assume these are not the freight rates, will you check it?

Mr. Ewing: I haven't even a copy of it.

Trial Examiner Norwood: You should have a copy of it. You shall have a copy of it. The objection is overruled and the exhibit is received as marked.

(The document referred to, heretofore marked COMMISSION'S EXHIBIT 715-A and 715-B for identification, was received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 716 which refers back to the same statement we made with regard to 713.

Mr. Ewing: I make the same objection with regard to 716 and the added objection that as a document itself it does not show anything. It doesn't show where it came from.

Mr. Wright: Your Honor, I would like to offer several of these exhibits, all of which are in the same status, so a common objection and common ruling may be made on them.

They are Commission's Exhibits 717, 718, 719-A through -C, 720-A and -B, 721 and 722, and also Commission's Exhibits 740-A, -B, -C, and -D.

575 Mr. Hinds: I object to introducing them collectively and insist they be introduced separately so we can examine them.

Trial Examiner Norwood: We do this quite frequently. It saves quite a bit of time.

Mr. Wright: All of them were offered under the statement as to Commission's Exhibit 713.

I might say they were all identified at page 334 of the record except for Commission's Exhibit 740 which was identified at page 743.

Trial Examiner Norwood: Has the Commission made duplicates of these exhibits for use of counsel?

Mr. McDermott: Mr. MacIntyre said a long time ago he would have photostats made for us but we have not got them as yet.

Mr. MacIntyre: These exhibits are in the form of let-

ters supplied by officials of the National Lead Company to the Attorney-Examiner Dunn of the Federal Trade Commission. It certainly would appear they kept a carbon copy if nothing else.

Mr. Ewing: If the branches had the copies they are scattered all over the United States.

Mr. MacIntyre: If Mr. Ewing does not have such copies in his possession we will be happy this afternoon to make moves to secure a copy of the documents for him and
576 once they are in evidence, he will have copies of what is in evidence.

Trial Examiner Norwood: I hope counsel will make every effort to have copies made.

Mr. Ewing: I object to Exhibit 717 upon the grounds indicated and upon the further ground that the so-called rates given purport to be applicable only to shipments between Chicago and Pittsburgh, and do not, according to the face of document, relate to sales or prospective sales. It is simply inter-branch or inter-company shipments, if you want to call it that.

The same objection with respect to Exhibit 718.

The same objection with respect to 719-A to -C, and the same objection with respect to 720-A and -B.

The same objection with respect to 721, and the same objection with respect to 722.

And with respect to all, I object on the further ground there is nothing to indicate that in connection with any price charged by National for the sale of any of its products there is any recognition specifically of any freight rate of any kind.

I object also with respect to 740-A, -B, -C, and -D upon the further ground that there is nothing in the exhibits to indicate who prepared them, how they were prepared, and, of course, with respect to all exhibits I reserve my
577 right to verify their accuracy.

Mr. Hinds: The respondent Glidden Company, in respect to all of these exhibits, states that most have been shown to be statements made by one official of the National Lead Company to another official of that company with respect to a general fact, namely, freight rates.

As to the respondent Glidden, that is mere hearsay. If the freight rates are to be shown by the statement of an official of the National Lead Company, he should be brought into court so we may have an opportunity of cross-examining him.

In addition to that, as to The Glidden Company, as said before, there is no issue in the case with respect to freight rates, because we admit that our prices are uniform delivered prices within each so-called zone.

Mr. Wright: Your Honor, in reference to a statement by Mr. Ewing, with respect to Commission's Exhibit 740-A to -D, the transcript on page 384 contains testimony by the witness "They are freight rates covering particular shipments of white lead by National Lead Company, which Mr. Carroll, Mr. Reque and myself have examined, and these rates were handed to me by Mr. Carroll who, at my request, had obtained them from the local traffic man on the premises."

Mr. Ewing: That is good hearsay.

Trial Examiner Norwood: What is the page there?

578 Mr. Wright: Page 384.

Trial Examiner Norwood: And who examined them?

Mr. Ewing: Mr Carroll and Mr. Reque. Mr. Carmichael said they were handed him by Mr. Carroll who at his request obtained them from the local traffic man after they had examined particular shipments of white lead, from their records.

Obviously, Mr. Carroll was not there, and I said there was nothing on the exhibits to show who prepared them or how they were prepared.

Trial Examiner Norwood: The witness had not obtained them from the local traffic man; had he?

Mr. MacIntyre: He obtained them from an official of the National Lead Company who had the traffic manager of the National Lead Company make them up for the investigator.

Carroll and Reque are the officials from whom they were obtained. They are officials charged with operating a large portion of the National Lead Company.

Mr. Hinds: Enlarging my objection on behalf of Glidden, suppose these were actually letters from the National Lead Company to the Commission stating "We have at your request investigated the freight rates and they are as follows:"? How would that be evidence of freight rates against us?

The National Lead Company can bind the rest of us,

579 and we can bind them prima facie under the stipulation as to what the facts are, but not as to the facts set forth in the document.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I am going to reserve my ruling on this and look them over during the lunch hour.

What is your pleasure as to the lunch hour, gentlemen?

(Discussion off the record.)

Trial Examiner Norwood: We will recess at this time and reconvene at 2 o'clock.

(Whereupon, at 12:30 p. m., a recess was taken until 2:00 p. m., of the same day.)

580 Afternoon Session.

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

(Commission's Exhibits 752-A to -Z-144, 714, 715, were marked for identification.)

In regard to Commission's Exhibit 583 for identification, which was offered in evidence this morning, I have looked up the record on that and I want to ask who Mr. Carroll and Mr. Reque are.

Mr. MacIntyre: Officials of the National Lead Company.

Trial Examiner Norwood: They are officials. That is not denied. I will overrule the objections and I receive Commission's Exhibit 583 in evidence.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 583, was received in evidence.)

Trial Examiner Norwood: Now, respecting Commission's Exhibits for identification 716, 717, 718, 719-A to -C, inclusive, 720-A and -B, 721, 722, and 740-A to -D, the objections are overruled and they are received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 716; 717; 718; 719-A, 719-B, 719-C, 720-A, 720-B; 721; 722; 740-A, 740-B, 740-C, 740-D, were received in evidence.)

581 Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, in order to follow a logical sequence, we want to take up some matters relating to freight rates and shipments by National Lead Company which have not been identified. They were all supplied to us by the National Lead Company, and I don't think there

will be any question about the identification of them, but I want to take that matter up with Mr. Ewing here.

Trial Examiner Norwood: All right.

Mr. Wright: Now, I ask that this letter be marked for identification by the reporter.

Trial Examiner Norwood: What is the next number?

Mr. Wright: That will be 750, I believe, sir.

Trial Examiner Norwood: Was anything marked this morning?

Mr. Wright: No, sir.

Mr. MacIntyre: No. We have numbers already up to 749-D.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Mark it 749, Mr. Reporter.

(The letter referred to was marked Commission's Exhibit 749 for identification.)

Mr. MacIntyre: Off the record.

582 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

(Certain documents were marked Commission's Exhibits 750, 751-A and 751-B for identification.)

Mr. Wright: Another document which will be forthcoming from the National Lead Company tomorrow will be marked Commission's Exhibit 751-C for identification, which relates to 751-A and -B. I would like to hand these to Mr. Ewing and ask him if he is willing to make a statement about identification of them.

Mr. Ewing: Exhibit 749 for identification was prepared by the National Lead Company at the request of Mr. Carl H. Depue and sent to him with a letter written by me dated August 24, 1945.

Mr. MacIntyre: What is your last statement there?

Mr. Ewing: I say I think what it is speaks for itself. I will not describe it any more. Exhibit 750 for identification is the original letter from Mr. Fred McCarthy of National Lead Company addressed to Federal Trade Commission, dated August 21, 1945, written at the request of Mr. Carl H. Depue for the information therein set forth. Exhibit 751-A for identification was prepared by National Lead Company at the request of Mr. Carl H. Depue for the information set forth there, and it was forwarded to Mr. Depue by me with my letter of August 8, 1945.

583 Mr. MacIntyre: That last statement applies to both 751-A and -B?

Mr. Ewing: The same applies to Exhibit 715-B for identification. There are certain corrections to be made on these exhibits which will be supplied in the sheet to be marked 751-C for identification.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibits 576-A through -E, which is a list of states in which National Lead's white-lead-in-oil was sold under "Fair Trade" contracts, together with a specific contract which was identified on page 154 of the record.

Trial Examiner Norwood: Did the counsel want to offer those others that have been identified?

Mr. Wright: No, sir. I would like to withhold those until we have some other exhibits in the record.

Trial Examiner Norwood: All right.

Mr. Hinds: I would like to have it noted with respect to those that have been identified but not offered that The Glidden Company does not in any way concede that the practices therein stated are facts.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked, Commission's Exhibits 576-A to -E.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 576-A, 576-B,
584 576-C, 576-D and 576-E, were received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 617-A to -C, which is a specimen Fair Trade Agreement entered by the John T. Lewis and Brothers Company, a subsidiary of National Lead, with its customers, identified on page 322 to 325 of the record.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 617-A, 617-B, and 617-C, was received in evidence.)

Mr. Wright: I would like to offer Commission's Exhibit 618-A to -C, which is a specimen Fair Trade Agreement entered into by the National Lead and Oil Company of Pennsylvania with its customers, department of the National Lead Company, 322 to 325 of the transcript.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBITS 618-A, 618-B, and 618-C, was received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 619-A to -C, which is a specimen Fair Trade Agreement entered into between the National Lead Company with its customers for white lead-in-oil, same 585 page, for identification.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 619-A, 619-B, and 619-C, was received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 527, which is a carbon copy of a letter from Albert Chatfield to E. J. Cornish, chairman of the board of the National Lead Company, under date of June 15, 1935, which is identified at page 144 of the record.

Mr. Wood: What page is that identified at?

Mr. Wright: 144.

Mr. Wood: I would like to look up where it is identified, for objection.

Trial Examiner Norwood: Yes, go ahead.

Mr. Wood: Mr. Wright and your Honor, I would like to look up Mr. Chatfield's testimony in respect to that exhibit and see whether or not I wish to object after looking at his testimony.

Trial Examiner Norwood: What page is it?

Mr. Wright: 171. I have it right here.

Mr. Wood: I wish to object to this on the grounds that it is completely irrelevant in that it has to do with a transaction that did not go through, that is, it has to do 586 with a proposed transaction that did not go through.

Mr. Ewing: On behalf of National, I object on the further ground that a large portion of it at least represents hearsay.

Trial Examiner Norwood: Who is Mr. Chatfield?

Mr. Wood: Mr. Chatfield is a Cincinnati broker.

Mr. Wright: Who testified at a hearing in Cincinnati, and your Honor will find the record of his testimony concerning this exhibit on page 177 and page 178 of the transcript.

Trial Examiner Norwood: Well, is he connected in any way with—what respondent is he connected with?

Mr. Wright: Well, your Honor, the complaint alleges that National Lead Company attempted to secure a stock control of the Eagle-Picher Company.

Mr. Ewing: It alleges that we did secure it; not that we attempted to.

Mr. Wright: And Mr. Cornish is the chairman of the board of the National Lead Company, to whom this stock broker is writing, and you will see that he testified, when presented with that exhibit for identification and asked if he recognized it as a photostatic copy of the letter he wrote —he says, "I don't remember the letter, but it looks like a photostatic copy of the letter I wrote.

587 "Well, did you write such a letter?

"I wouldn't swear to it, but it has my signature on it, so I must have written it."

Mr. Ewing: Chatfield is wholly independent.

Mr. Wood: He is connected with Eagle-Picher in any way.

Mr. Ewing: Or with National.

Mr. Wright: Well, it is our contention that Chatfield was acting for and in behalf of officials of the National Lead Company in this transaction.

Mr. Ewing: This testimony disproves that.

Mr. Wright: He so testified.

Mr. Ewing: He didn't so testify, Mr. Wright.

Trial Examiner Norwood: Don't make side remarks.

Mr. MacIntyre: May I make an observation on this, if your Honor please?

Trial Examiner Norwood: Let me read it. I will hear you in just a minute.

Mr. Wright: Your Honor, there is another exhibit which is a companion and which is also in exactly the same category which you may wish to consider. I will offer in evidence Commission's Exhibit 528, which is likewise a letter from Mr. Chatfield.

Mr. MacIntyre: If your Honor please, I want to point out that these two exhibits have a bearing on the

588 charge which is made in subparagraph 6 of paragraph 7 of the complaint, appearing on page 5 of the mimeographed copy. This isn't the only evidence that is to be offered concerning the amount of stock in the Eagle-Picher that respondent National sought and did secure. We don't, of course, allege that National did secure this particular stock, all of it, that Chatfield was employed by them to buy

into the Eagle-Picher Company. We do have evidence that there was a substantial amount of stock bought by National or on its behalf, as is alleged in this subparagraph 6 on page 5, and we contend that the two documents that are now in the pending offer will show the purpose of the acquisitions which were made by National to be the purpose that is charged in the preamble of paragraph 7 appearing on page 4 of the mimeographed copy of the complaint. It is relevant to that charge, that is, both of these documents.

Mr. Ewing: The statements by Mr.—

Trial Examiner Norwood: Give me the paragraph there and subparagraph, so I can locate it.

Mr. Ewing: Subparagraph 6.

Mr. MacIntyre: Subparagraph 6 on page 5 of the mimeographed copy of the complaint, and paragraph 7, that is, the preamble in it, as appearing on page 4 of the mimeographed copy of the complaint. That is, the amended complaint.

589 Trial Examiner Norwood: Well, just what is the charge there? What is wrong about the buying up of part of Eagle-Picher?

Mr. MacIntyre: Simply this: The charges that appear on page 4 of paragraph 7 of the complaint is that National, at the time of its inception, in 1891, embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of white lead, and there is evidence in the record backing those charges up even at this date; that, following through with that plan, it secured the control over numerous lead producing and distributing concerns.

590 Trial Examiner Norwood: Yes, I recall.

Mr. MacIntyre: Now, when we come to paragraph 7, there is an allegation that in furtherance of that it also secured control of a substantial part of the capital stock of respondent Eagle-Picher Lead Company, and that up to February, 1943, it still held a more substantial part of the Eagle-Picher Lead Company's stock through one Edward J. Cornish, who had served as president of respondent National, and the efforts of National through Cornish and Chatfield, as disclosed through Exhibits 527 and 528, show that they had the purpose to secure a substantial block of approximately a half million shares of Eagle-Picher. That

was what they were out to do, and if they had secured that at that time it would have given them absolute control over Eagle-Picher, because at that time the voting stock of Eagle-Picher was only about 900,000 shares.

Trial Examiner Norwood: Well, that is all clear, but what we want to get at is the meat of the thing, as to whether or not this is satisfactory evidence that may be received to support that.

Mr. Ewing: I submit that the letters of this—

Trial Examiner Norwood: Here is this man Chatfield, who was a broker, stock broker, and he is writing to Cornish and to Carter in a way that would indicate that both of these gentlemen had given him an order to buy some of this stock.

Mr. MacIntyre: And he was on the stand and tes-
591 tified that that was the fact, pages 177 and 178 of the record.

Trial Examiner Norwood: Well, I want to see that.

Mr. Ewing: If you can find any testimony that they gave him an order to buy this stock from Chatfield, I would like for you to point it out.

Mr. MacIntyre: The record is very clear at the point I have cited to the effect that they were negotiating with Chatfield to purchase this block of stock from financial interests in Cincinnati.

Mr. Ewing: He was trying to work up a deal, Mr. Chatfield was—there is no doubt about that—with somebody, but he testified, after being asked if he received a response to his letter to Mr. Carter, bottom of page 179, "No, I didn't receive anything". This Mr. Weatherhead, whom he had also communicated with, lived in New York, and he had charge of the whole matter, and nothing came of it. We could not do anything with it. This Mr. Weatherhead has been dead for several years.

Trial Examiner Norwood: Now, the question here is: Did National or these officers of National give this man an order? Is there any evidence that they gave him an order for this stock?

Mr. Ewing: There is none in the record that I know of.

Mr. Wood: My objection is directed to the point
592 that it is Mr. Chatfield's affirmative testimony that nothing came of this.

Trial Examiner Norwood: I don't think that that makes so much difference in the matter of disclosing purpose. It might disclose purpose. But I would like to see it con-

nected up in some substantial way with some affirmative action on the part of National.

Mr. MacIntyre: Well, if Your Honor please, may I—

Trial Examiner Norwood: 177, did you say?

Mr. MacIntyre: May I refer you to the record beginning with line 6, page 178?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I put this question to Mr. Chatfield. I am talking about a document marked for identification as 527.

"You accept that it is a copy of a letter from you to Mr. Cornish?"

Now, mind you, at that time Mr. Cornish was one of the chief executives of the National.

"Answer: Well, it must be. I went in to see Mr. Cornish on several occasions originally, about stock owned with National Lead in view of purchasing, and I may have written this letter in answer to that interest.

"Question: But you don't have now, any copy of any of your correspondence with Mr. Cornish?

593 "Answer: No I haven't any of it. I don't think I had ever a letter from Mr. Cornish or Mr. Carter, either one."

But he has testified there, beginning with line 6 at 178, that he did discuss the matter in person with Mr. Cornish on several occasions. That was how he opened his negotiations.

Trial Examiner Norwood: What does Mr. Cornish say?

Mr. MacIntyre: Mr. Cornish, unfortunately, is dead.

Trial Examiner Norwood: And what did he say Mr. Cornish said?

Mr. Ewing: He never testified that Mr. Cornish said anything to him.

Trial Examiner Norwood: Mr. Carter?

Mr. Ewing: He never testified that Mr. Carter said anything to him. As I say, Your Honor, it is perfectly clear from what he did say that he was a stock broker trying to work up a deal.

Mr. MacIntyre: I want to point out to Your Honor that Mr. Ewing has stipulated on the record at page 144 that he has produced these records, the two documents that you hold in your hand, in photostatic form from the files of National Lead Company, a respondent here.

Mr. Ewing: We had them. They were written to us.

Mr. MacIntyre: So how did they get there with
594 Chatfield's name on them from Cincinnati if Chatfield didn't write them for National?

Trial Examiner Norwood: That may be all right, Mr. MacIntyre, but I just could not be happy about this thing until you connect it a little. If it is true, you will be able to do it, but that is not my responsibility. But I think that I will sustain the objection for the time being to this and give you a chance to connect it up a little better than this, because a man is not responsible for what other people wrote to him.

Mr. MacIntyre: Well, it so happens that National produced these from their files.

Mr. Ewing: Anybody in the United States or the world can write National a letter any time they want.

Trial Examiner Norwood: Now, this does not seem to be in the regular course of business like these people's prices and these people's quotations and all. They are the transactions themselves, and if you find those in the files and they connect up and they are consistent with other things you find in the files, you may consider them, but this is an isolated transaction, so far as I know now, and I am going to sustain the objection, and you can connect it up later.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 664, which is identified at page 342 of the record, which shows the comparative sales of the National Lead Company of white lead in oil and dry
595 lead over the years 1940, 1941, and 1942, together with their percentage of the business as to the rest of the industry.

Mr. McDermott: What page of the transcript, please?

Mr. Ewing: Insofar as the typewritten matter appearing in the exhibit is concerned, I have no objection. I haven't the faintest idea whose writing is on the exhibit, and I don't think it should go in.

Trial Examiner Norwood: What about that writing, Mr. Wright?

Mr. Wright: Well, I have no idea where the writing came from. I am now going to offer in evidence Commission's Exhibit 578-A, which should be considered in connection with it, because at page 155 of the record it is stated to be a document prepared by the National Lead Company and furnished to the Federal Trade, with the same effect

Mr. Ewing: Which page did you say, Mr. Wright?

Mr. Wright: That is on page 155 of the transcript.

Mr. Ewing: I have no objection to this.

Trial Examiner Norwood: Well, does that throw any light on the writing?

Mr. Wright: I am not offering the writing. It is just the typewritten material that we are offering in the first exhibit; that is correct.

Trial Examiner Norwood: All right.

Mr. Wright: The second exhibit is handwriting.

596 Trial Examiner Norwood: 664 and 578-A are received in evidence. It is understood that the writing is not included, the handwriting in pencil is not included.

Mr. Wright: In the first one, that is?

Trial Examiner Norwood: In 664, yes. I want to make that clear.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 664 and 578-A, were received in evidence.)

Mr. Wright: I wish to offer in evidence Commission's Exhibit 526, which is a notification to Harold Rowe, Chairman, White Lead Sales Committee, by Secretary, showing action of the Board of Directors in setting various prices in white lead in oil as of March 1, 1935.

Mr. Ewing: The letter is dated February 1, 1935?

597 Mr. Wright: Yes, but the prices were March 1.

Mr. McDermott: What page of the record, please?

Mr. Wright: That is identified at page 144.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 526," was received in evidence.)

Mr. Wright: Your Honor, I also offer in evidence 562, which is a letter from Ellis E. Busse, of the Cleveland branch of the National Lead Company, to Harold Rowe, under date of April 17, 1942, identified at page 151 of the record.

Mr. Ewing: I will object to this on the ground that the subject matter which is referred to does not appear in any sufficient detail from the exhibit to form a basis for the reception of the exhibit.

Trial Examiner Norwood: Who is Mr. Busse?

Mr. Ewing: He was, I believe, branch manager of National Lead Company's Cleveland branch at that time.

Mr. Wright: Your Honor, it seems to me that that shows a matter of policy by the National Lead Company in its branches with reference to the method of quoting and prices made to Government agencies on Government bids.

Mr. Ewing: How can you say that an isolated letter with respect to one or two isolated transactions is
598 evidence of a policy for anything, for that branch, let alone all the other branches, Your Honor?

Mr. Wright: We don't purport to show by that letter the whole policy of the National Lead Company.

Mr. Ewing: Well, that is what you just said.

Mr. Wright: It is everything that goes to make up that policy.

Mr. Ewing: Well, are you trying to prove the policy with this letter?

Mr. Wright: No. In part.

Mr. Ewing: Well, to the extent that it is offered in part to prove the policy, I object.

Trial Examiner Norwood: I think that that should come in for study.

Objection overruled. Received as marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 562," was received in evidence.)

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibits 539, 540, and 541, which are copies of telegrams by Harold Rowe to branch managers.

Mr. Welch: What were those numbers again, Mr. Wright?

Mr. Wright: 539, 540, and 541. 539 and 540 are copies of telegrams from Harold Rowe to various branch
599 managers. 541 is a copy of a telegram from the branch manager of the San Francisco office, National Lead Company, to Harold Rowe regarding the announcement of a price change. That is identified at page 147 of the record.

Mr. Ewing: I will object to these three on the ground that they are irrelevant. They are inter-office communications with respect to price changes.

Mr. Wright: Your Honor, we feel that is relevant as showing a part of the policy of the National Lead Company in making up and announcing its prices to the public through its branches.

Mr. Ewing: Just what is that relevant to, Mr. Wright, may I inquire?

Mr. Wright: It seems to me one of the primary issues in the case is the manner in which prices on white lead in oil are made and announced.

Trial Examiner Norwood: Well, it is a wire to raise the price and lower it, which they all do all the time. It is the only way they can get them up or down.

Mr. Wright: That is right.

Trial Examiner Norwood: If you can connect it up with anything—I just don't see that there is anything there that you can get your teeth in.

Mr. Wright: We think it is relevant, first of all, to show the interval between the time decisions are made
600 to raise prices and the time price changes are put into effect.

Mr. Ewing: Standing in and of itself and taking us alone, there is certainly no importance whatsoever as to how we go about raising or lowering the prices.

Mr. MacIntyre: Well, if Your Honor please—

Trial Examiner Norwood: Are you going to connect this up by price information covering about the same time by other respondents, and so forth?

Mr. Wright: Yes, sir.

Mr. MacIntyre: If Your Honor please, it is, first, relevant to another issue that is raised in this complaint, and that is that prices are made by these respondents as administered prices from their corporate offices in New York, Cincinnati, Cleveland, Chicago, and without any reference to the supply-and-demand factors at each of these destinations. In other words, the bargain power of the buyer is nil. It back in those days was handled—that is, the price of this lead—as if it were a seller's market as it is now, when the buyer has nothing to say as to whether he will get it at his price or not.

Trial Examiner Norwood: I don't think that is followed by a firm changing prices and requiring its branches to do the same thing. It has to do it that way.

Mr. MacIntyre: Yes, but it is meeting competition and making competition, as the respondents contend,
601 the pressure on the prices would not be from New York but from these various destinations where the price is applicable.

Trial Examiner Norwood: There is nothing to show that the pressure did not come that way, first.

Mr. Ewing: Naturally, the management fixes the prices.

Mr. MacIntyre: That is exactly what we contend, that the management makes them.

Trial Examiner Norwood: You will have to start somewhere. I will give you an opportunity to connect these up. I will receive these subject to connection. 539, 540, and 541, the objections are overruled, and they are received in evidence.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 539, 540, and 541," were received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 525, which is a copy of a letter from Harold Rowe, of the National Lead Company, to Sherwin-Williams Company of Canada, under date of December 14, 1933, announcing a price change. Exhibit 525. It is identified at page 144 of the record.

Mr. Ewing: I will object to that, if Your Honor please, on the ground that it is a communication addressed to
602 presumably reaching, the Sherwin-Williams Company of Canada. It is obviously without the scope of this proceeding.

Trial Examiner Norwood: Objection overruled. Received as marked.

Mr. Welch: Your Honor, may I interpose one additional objection before Your Honor rules?

Trial Examiner Norwood: Yes. Go ahead.

Mr. Welch: Sherwin-Williams Company, the defendant in this case, did not on December 14, 1933, own the controlling interest, or any substantial portion of the stock of the Sherwin-Williams Company of Canada.

Trial Examiner Norwood: Well, it appears to me that this is offered to show a national quotation here on this date. Is that right?

Mr. Wright: Well, it is offered to show an announcement by National of a price change.

Mr. Ewing: All the price changes are in exhibits that have already come in. I fail to see the relevance of this letter addressed to a company that is not a respondent, without the States, involving a matter not in issue in this proceeding.

Mr. Wright: Also to show to whom the National Lead Company announced such price changes.

Trial Examiner Norwood: I will receive it subject to connection.

603 (The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 525," was received in evidence.)

Mr. Wright: Your Honor, I will offer in evidence a series of Commission's Exhibits, 549, 550, 551, 552, and 553, all of which consist of copies of telegrams sent by the Office of Price Administration to the National Lead Company, over a period from January 14 to March 31, 1942, setting ceiling prices on various lead pigments.

Mr. Ewing: That begins at what number?

Mr. Wright: 549.

Mr. McDermott: What page of the transcript, please?

Mr. Wright: That is at page 148.

Mr. Ewing: We object to the offer of all of these exhibits, Your Honor.

As to 549, you will note that that is a telegram from Leon Henderson, Administrator, Office of Price Administration, addressed to National Lead Company, requesting that no such pigments therein mentioned could be sold at prices in excess of prices existing on January 2, 1942. Now, of course, we undoubtedly received such telegram, but I submit that it is not at all relevant to any of the issues in this case unless they are charging, of course, that O. P. A. is a co-conspirator.

With respect to the next exhibit, 550, that is a telegram calling us into conference to discuss a proposal for
604 stabilization of prices, inquiring as to whether we will have a representative there. I submit that that is wholly irrelevant to any of the issues here.

The third one, 551, is a telegram fixing the ceiling prices on certain pigments. We undoubtedly received it. They undoubtedly represent the ceilings, but neither that exhibit nor the succeeding exhibits, 552 and 553, have any relevance that I can see to any issue in this case.

Trial Examiner Norwood: How about 552 and 553?

Mr. Ewing: Same.

Trial Examiner Norwood: You say it is the same objection.

Go ahead, Mr. Wright.

Mr. Wright: Your Honor, we have no intention of charging the O. P. A. as being a party to any conspiracy, and the proffer of that material was simply to make the record complete as to this pricing information so that the full background will be in the record. We have no serious

wish to have it in, and we will withdraw the offer if Mr. Ewing objects to it.

Trial Examiner Norwood: Well, I think, inasmuch as it is pleaded there by some of these respondents that they did affect the prices at that time, or that since a certain date they have, I think that it is part of the price picture. We might just as well leave it in.

605 Objection overruled. 549, 550, 551, 552, and 553 are received. If we find that it is not relevant we can withdraw it.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 549, 550, 551, 552, and 553," received in evidence.)

Mr. Wright: Your Honor, may we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a 15-minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: The hearing will be in order.

Mr. Wright: I would suggest that we adjourn over until 10 o'clock in the morning, at which time the marking of these exhibits will be complete, and then we can call Mr. Depue at that time and have him testify.

Trial Examiner Norwood: Any objections?

Mr. Ewing: No objection.

Trial Examiner Norwood: We will recess until—do you want it 9:30 or 10 o'clock?

Mr. Ewing: I think 10 o'clock will be preferable with us.

Trial Examiner Norwood: We will recess until 10
606 o'clock tomorrow morning.

In the meantime, will the Reporter mark the exhibits up and be ready?

(Thereupon, at 3:35 o'clock p. m., June 17, 1946, the hearing was adjourned until Tuesday, June 18, 1946, at 10 o'clock a. m.)

607 Room 332, Federal Trade Commission Building, Washington, D. C., June 18, 1946.

Met pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Ssq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), and T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parks & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

608 Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), and Richard Serviss, Esq. (1100 American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

609 Proceedings.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Office of the

Federal Trade Commission, Washington, D. C., at 10 o'clock a. m.

Mr. Wright: Your Honor, I would like to call as a witness Mr. Carl H. Depue.

CARL H. DEPUE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

(Documents were thereupon marked for identification as Commission's Exhibits Nos. 752-A, 752-B, 752-C, 752-D, 752-E, 752-F, 752-G, 752-H, 752-I, 752-J, 752-K, 752-L, 752-M, 752-N, 752-O, 752-P, 752-Q, 752-R, 752-S, 752-T, 752-U, 752-V, 752-W, 752-X, 752-Y, 752-Z, 752-Z-1, 752-Z-2, 752-Z-3, 752-Z-4, 752-Z-5, 752-Z-6, 752-Z-7, 752-Z-8, 752-Z-9, 752-Z-10, 752-Z-11, 752-Z-12, 752-Z-13, 752-Z-14, 752-Z-15, 752-Z-16, 752-Z-17, 752-Z-18, 752-Z-19, 752-Z-20, 752-Z-21, 752-Z-22, 752-Z-23, 752-Z-24, 752-Z-25, 752-Z-26, 752-Z-27, 752-Z-28, 752-Z-29, 752-Z-30, 752-Z-31, 752-Z-32, 752-Z-
610 33, 752-Z-34, 752-Z-35, 752-Z-36, 752-Z-37, 752-Z-38, 752-Z-39, 752-Z-40, 752-Z-41, 752-Z-42, 752-Z-43, 752-Z-44, 752-Z-45, 752-Z-46, 752-Z-47, 752-Z-48, 752-Z-49, 752-Z-50, 752--Z-51, 752-Z-52, 752-Z-53, 752-Z-54, 752-Z-55, 752-Z-56, 752-Z-57, 752-Z-58, 752-Z-59, 752-Z-60, 752-Z-61, 752-Z-62, 752-Z-63, 752-Z-64, 752-Z-65, 752-Z-66, 752-Z-67, 752-Z-68, 752-Z-69, 752-Z-70, 752-Z-71, 752-Z-72, 752-Z-73, 752-Z-74, 752-Z-75, 752-Z-76, 752-Z-77, 752-Z-78, 752-Z-79, 752-Z-80, 752-Z-81, 752-Z-82, 752-Z-83, 752-Z-84, 752-Z-85, 752-Z-86, 752-Z-87, 752-Z-88, 752-Z-89, 752-Z-90, 752-Z-91, 752-Z-92, 752-Z-93, 752-Z-94, 752-Z-95, 752-Z-96, 752-Z-97, 752-Z-98, 752-Z-99, 752-Z-100, 752-Z-101, 752-Z-102, 752-Z-103, 752-Z-104, 752-Z-105, 752-Z-106, 752-Z-107, 752-Z-108, 752-Z-109, 752-Z-110, 752-Z-111, 752-Z-112, 752-Z-113, 752-Z-114, 752-Z-115, 752-Z-116, 752-Z-117, 752-Z-118, 752-Z-119, 752-Z-120, 752-Z-121, 752-Z-122, 752-Z-123, 752-Z-124, 752-Z-125, 752-Z-126, 752-Z-127, 752-Z-128, 752-Z-129, 752-Z-130, 752-Z-131, 752-Z-132, 752-Z-133, 752-Z-134, 752-Z-135, 752-Z-136, 752-Z-137, 752-Z-138, 752-Z-139, 752-Z-140, 752-Z-141, 752-Z-142, 752-Z-143, 752-Z-144.)

Direct Examination by Mr. Wright.

Q. Mr. Depue, will you state your full name and
611 occupation for the record?

A. Do you want the middle name?

Carl Harmon Depue.

Trial Examiner Norwood: What is the middle name? Carl?

The Witness: Harmon.

I am a certified public accountant and employee of the Commission.

By Mr. Wright:

Q. Mr. Depue, how long have you been employed by the Federal Trade Commission?

A. Seventeen years.

Q. Did you have any occasion to make an examination of the records of National Lead Company?

A. I did.

Q. Approximately over what period of time was that examination conducted?

A. It seems to me it was five or six weeks, in their office; in their offices.

Q. During what time was that, roughly?

A. Wasn't it last year at this time? I think so.

Q. Were you assisted in that examination by any other employees of the Commission?

A. Two of them, yes.

Q. Who were they?

612 A. Frank Brown and—I can't remember the other's name.

Q. Well, was this investigation under your supervision and direction?

A. Yes.

Q. In the course of that investigation, did you consult with various officials of the National Lead Company—

A. I did.

Q. In securing the information?

A. I did.

Q. Who were these officials, if you recall?

A. Mr. Ewing, Mr. McDermott, and Mr. McCarthy.

Q. I show you a document which has been marked as Commission's Exhibit 752-A through Z-144, for identification, and ask you to state what that is.

A. That is an analysis of their sales in about 60 cities, I believe, during the months of January to March, 1941, October to December, 1941, inclusive, and January to March, 1943.

Q. I show you the sheet, now, which is marked Com-

mission's Exhibit 752-B, for identification, and ask you to describe what that is.

A. It is an analysis of a representative sample of sales made by the Boston branch, or the Boston Lead Company, which is a subsidiary of The National Lead Company, during those three three-months' periods, January to March —the first quarter of 1941, last quarter of 1941, first
613 quarter of 1943, in various sizes of containers, which pertains to sales of white lead-in-oil.

Q. And I call your attention to the—

Mr. Ewing: Excuse me, Mr. Wright.

If your Honor please, I move to strike out from that answer so much of it as pertains to the witness' characterization with respect to the witness' analysis, which I believe he called a representative specimen, and also with respect to the characterization of the transaction which he designated as "sales." I think the document speaks for itself, and there should be no conclusions in the answer.

Mr. Wright: I believe, Mr. Ewing, as we get further along with the identification, that it will be perfectly plain exactly what his answer is and what his description is of the document.

Mr. Ewing: That may be, but I certainly prefer not to have a description which represents the witness' conclusion.

Trial Examiner Norwood: Yes.

Read the statement in question.

(The Reporter read the last answer.)

Trial Examiner Norwood: I think we ought to be a little bit more particular in our descriptions there. He may say that it is an analysis of sales at that place and time which he considers representative. I think he may
614 state it that way, or he may—

Mr. Ewing: I have no objection at all to it appearing that he considers it a representative analysis. But, of course, that leaves the question open as to whether it is or isn't, but I think the characterization of the transaction as "sales" also represents the witness' conclusion.

Trial Examiner Norwood: But if he knows, if he wants to commit himself that far—I just want to caution here, inasmuch as the language is objected to—if he wants to commit himself so far as to swear positively that those are the representative sales, he may do so; but he will have to tell you on cross-examination how he knows that, and that will bring on some more talk.

Mr. Ewing: I am not anxious to enlarge the record for the sake of hearing my voice. I can assure you of that.

Mr. Wright: Well, Your Honor, I might say that we are going through this in detail, and I think it will appear perfectly plain before we are through exactly what this information is. I have no desire to have it characterized as anything but what it is.

Trial Examiner Norwood: I will deny the motion for the time being.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Yes.

(Discussion off the record.)

615 Trial Examiner Norwood: Do you wish to modify that statement there as to its being representative sales, as I have suggested?

The Witness: No.

Trial Examiner Norwood: Motion denied.

Go ahead.

By Mr. Wright:

Q. I call your attention to the first column of 752-B, which is headed "Agents" where there is a list of names, and ask you what those names are.

A. That is the company's classification of those customers, and my information is that they were sold under consignment—that the goods were shipped to them on a consignment basis—

Q. Just a minute. Just answer my question here. In other words, these represent customers of The National Lead Company's branch?

A. That is right.

Mr. McDermott: In referring to these, you refer to the column at the lefthand margin of the page?

Mr. Wright: That is correct.

By Mr. Wright:

Q. I now direct your attention to the second column over, which is headed "January-March, 1941, Invoices, Number" and "Date," and ask you what those two columns represent.

A. Those are the actual numbers and dates that 616 appeared on the invoices that are covered by this summary.

Q. Were those taken from actual invoices of The National Lead Company?

A. They were.

Q. Which were supplied to you by officials of The National Lead Company?

A. That is right.

Q. I now call your attention to the columns marked "1 Pound." "5 Pounds," "12½ Pounds," "25 Pounds," "50 Pounds," "100 Pounds," and ask you what those figures under those columns represent?

A. They represent the quantities sold in those size containers and the prices that appeared on the invoices for those items.

Trial Examiner Norwood: Off the record a minute.

(Discussion off the record.)

By Mr. Wright:

Q. I now direct your attention to the column headed "Total Pounds WHLD, Billed," and the figures appearing thereunder. Will you describe those, please?

A. Well, the first of the two columns that you refer to is the total pounds of white lead that appeared on the invoice.

Q. That were billed to that particular customer which appears at the left of the column?

A. That is right.

617 Q. I now call your attention to the columns marked "Shipments," "Origin," and "Destination," and ask you to explain that.

A. Well, on that particular exhibit no place of origin is given, but the destinations are given, which is the point to which the goods were shipped to the respective customers.

Q. I see. Now, Mr. Depue, was this information taken off original invoices which were brought to you by officials of the National Lead Company?

A. That is right.

Q. In response to what request were the invoices supplied to you?

A. They were requested to furnish, if I remember rightly, all of their invoices during those periods to each class of customers.

Q. You say all of their—

A. In those respective cities.

Q. You say all of their invoices. Then, so far as you know, there was no selection made?

A. They were all shipped to the company's offices in New York and in boxes, of course, and they were sorted according to customer classifications, and then handed to me in bundles of that nature, and then from those bundles I selected what I regarded as a representative sample of the whole.

Q. You did not, then, record all of the invoices
618 which were presented to you covering sales of white lead—

A. No.

Q. —in those periods?

A. No.

Q. I call your attention to the initials which appear in the upper righthand corner of the sheet, Commission's Exhibit 752-B, "fib" and "hmm," and ask you what those initials are?

A. Those are the initials put there by my two assistants on this work who checked all of the data on these sheets claimed by them—initialed by them. That is to say, they checked the transcription of that information from the respective invoices.

Q. I call your attention to Commission's Exhibit 752-C, and ask you what that represents.

A. Well, it sets forth the information obtained from the invoices rendered by the Boston branch to the customers named in the first lefthand column, and those customers are classified there, and it shows the invoice numbers and dates, and shows the size of containers involved on those invoices, and the prices charged for lead in those sizes of containers, and contains the total white lead in pounds on each of those invoices, and over on the destination shows the points to which the goods were shipped.

Q. I call your attention to the statement "Sales to Steamships and Railroads" at the head of the lefthand column. From whom did you obtain that classification
619 of customers that appears there?

A. It is evident on the invoices, or was in most instances, anyhow. If that didn't govern, why, they were—I presume they were all indicated by the names on the invoices, but if that wasn't true, they were sorted with a little slip of paper indicating that was the classification.

Q. I call your attention to Commission's Exhibit 752-D, and ask you to state what that represents?

A. The same type of information exactly on invoices

rendered by the Boston branch to customers listed on the lefthand side which, in turn, are classified several ways, or there are several classifications of them. Each invoice number and date is given, the prices are shown, and the total under quantities in each size container are shown, and the total quantities on the invoices are shown, together with the destination of those shipments.

Q. I call your attention to the headings in the lefthand column, "Agents Sold to Dealers, Industrials Small, Industrials Large." Whose classification is that?

A. Mr. McCarthy's.

Q. In other words, that classification of customers was supplied to you by The National Lead Company?

A. That is right.

Q. I call your attention to Commission's Exhibit 752-E, and ask you to state what that is.

620 A. Well, it is an analysis of more invoices rendered by the Boston office to agents and dealers and industrials, and gives the number and date of the invoices, and quantities sold in each size container referred to here that is on the invoices, together with the prices for each item, each size container, and the total quantities on those invoices of white lead, and the destination of the respective shipments; and those bills were apparently all in the last quarter of 1941.

Q. I show you Commission's Exhibit 752-F, for identification.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. Wright:

Q. Mr. Depue, I show you the remaining sheets marked for identification Commission's Exhibit 752-G through Z-143, and ask you whether those sheets were prepared in a similar manner.

A. They were all of the same nature, except as plainly indicated by the headings; that is to say, they are a record of weights and prices covered by those invoices to the customers shown in the lefthand side of each sheet, and the destination is given of each shipment, and they were all selected by me from the mass of invoices submitted.

Q. In each case the invoice number of The National
621 Lead Company from which the information appearing

in the tabulation was secured appears in the second column of each sheet; is that correct?

A. I beg your pardon. I didn't hear the first part.

Q. In each case on all of these sheets does the original invoice number of The National Lead Company covering—does the number of the original invoice of The National Lead Company covering the transaction set out in the tabulation appear in that second column of each sheet?

A. Yes, the number and date of the invoices appear in all instances. I—Yes.

Mr. Wright: I have no further questions at this time. I have one more question I would like to ask.

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. You stated from the mass of invoices submitted. Were all these invoices submitted to you by Mr. McCarthy, or other officials of The National Lead Company, in their offices?

A. Yes.

Mr. Wright: That is all.

The Witness: In other words, I made the selection. They did not. But I tried to get a comprehensive, representative sample, and I believe I did.

By Mr. Wright:

622 Q. On the classification of customers appearing in the various sheets, was that secured from officials of The National Lead Company?

A. Yes.

Mr. Wright: I have no further questions.

Mr. Wood: Is that going to be offered in evidence?

Mr. Wright: Yes.

Mr. Wood: I mean it was marked for identification.

Mr. Wright: Well, I was offering him for cross-examination.

Trial Examiner Norwood: Well, as I understand, you have gone into nothing but the matter of identification of this document.

Mr. Wright: I now offer Commission's Exhibit 752-A through Z-144 in evidence.

Trial Examiner Norwood: The counsel may, on account of the nature of this document, cross-examine him on the identification if you want to, or ask him some voir

dire questions as to the contents to enable you to direct your objection, if you have any.

Mr. Ewing: That is what I would like to do, Your Honor, and I think it—

Trial Examiner Norwood: I will ask one more thing: Are the invoices on which those tabulations are based available to the counsel for the respondents?

623 Mr. MacIntyre: May I answer that question?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: They are, and a photostat of this exhibit has been in their possession ever since prior to the time it came into our possession.

Trial Examiner Norwood: How long is that?

Mr. MacIntyre: Last summer.

Mr. Ewing: We have the original invoices as represented by this segregated. I have not got them with me, but they were very kind to arrange for us to have the opportunity to make copies.

Trial Examiner Norwood: Commission's Exhibit, for identification, 752-A to Z-144 is now offered in evidence, and are there any objections?

Mr. Hinds: May I ask, does counsel intend to say that photostats have been given to all the respondents?

Mr. Ewing: No. Just us. Just us.

Might I have a couple of minutes to discuss these matters?

Trial Examiner Norwood: Yes.

Mr. Ewing: I would like to shorten cross as much as I can.

Trial Examiner Norwood: We will have a five minutes' recess.

(There was a short recess taken.)

624 Trial Examiner Norwood: The hearing will come to order.

Proceed.

Are there any objections to the proffer?

Mr. Ewing: Before objecting, Your Honor, I would like an opportunity to examine the witness.

Trial Examiner Norwood: Yes. Go ahead.

Mr. Ewing: Mr. Depue—

Mr. MacIntyre: Just a moment. May I inquire whether this is cross-examination, or what it is?

Trial Examiner Norwood: He may ask any voir dire questions with respect to the identification. Of course, it

is to be confined to identification until it is received in evidence.

Mr. McDermott: And with respect to the admissibility of the documents, sir, in light of the offer in evidence?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I would object to cross-examination in the form of a voir dire.

Trial Examiner Norwood: Yes. Well, go ahead and ask the questions. I will pass on them as they are asked, if I am required to do so.

Examination by Mr. Ewing.

Q. Mr. Depue, you testified, I believe, that the in-
625 voices which you asked National Lead to produce for your examination covered three three months' periods; is that correct?

A. Yes.

Q. And those periods were January to March, 1941; October to December, 1941, and January to March, 1943; is that correct?

A. It is.

Q. If I heard you correctly, I believe you testified that you asked National to produce all of its invoices covering white lead, dry or in oil during those periods?

A. That is correct.

Q. And those invoices were produced for your examination?

A. To the best of my knowledge, they were.

Q. The data shown on those exhibits which have been marked for identification, which you or your assistants took down, does not represent information with respect to all of the invoices during those periods, does it?

A. No, sir; only those that are listed.

Q. About how many invoices would you say are represented by the entries on these 167 or 168 sheets, roughly?

A. How many are listed here?

Q. Just roughly?

A. Eight or ten hundred.

Q. About how many, roughly, invoices did you and your assistants examine?

A. Probably twice that many; maybe more. It de-
626 pended. It wasn't always the same. In some instances I took larger proportionate samples than I did in

others in order to get the whole price structure portrayed. I might have to almost exhaust some lots to do that. Other times I may have taken only a quarter of them; maybe a half of them; or something else.

Mr. Ewing: I move to strike the answer, Your Honor, except the figure, approximately, the rest being a voluntary statement of the witness, not responsive to the question.

Mr. MacIntyre: I submit it was responsive.

Trial Examiner Norwood: I think he has given us some information here which we ought to know.

Read the question and answer.

(Last question and answer read by Reporter.)

Trial Examiner Norwood: Those explanations probably will be wanted, but they are not responsive to the counsel's question, and he has a right to have the—

The Witness: I tried to be responsive. I may not have been.

Trial Examiner Norwood: He has a right to have it responsive. So I will allow the motion to strike everything—read that answer again and I will tell you where to stop.

(Last answer re-read by Reporter.)

Trial Examiner Norwood: Strike everything after the words "maybe more" appearing there.

627 Proceed.

By Mr. Ewing:

Q. Mr. Depue, I direct your attention to the sheet marked 752-B, for identification, the first sheet about which you testified. The heading representing the classification is "Agents."

Did I understand you correctly that you testified that the classification or classifications generally were given you by representatives of National Lead?

A. Yes.

Q. Just as were the invoices, themselves?

A. Yes.

Q. But, as far as the data that appears on these sheets is concerned, you selected the particular invoices with respect to which you made notes?

A. That is right.

Q. And the selection was not made by National, or any of its representatives?

A. That is right.

Q. The only classification heading on this sheet 752-B, for identification, is "Agents"; is that correct?

A. That is right.

Q. And every invoice with respect to which you made a notation on that sheet was one of the Boston branch, so-called?

A. That is correct.

628 Q. When you noted on this sheet the data with respect to the first name listed under the heading "Agents," the invoice number 219 and the date 1/24/41, was it your understanding—as I believe you answered or referred on direct—that the shipment of the quantity shown to that concern represented a shipment to it on consignment?

A. Yes.

Q. In other words, it did not represent an actual sale by National Lead Company to B. & D. Wallpaper Company?

A. I would say it does represent a sale. It is an accounting for consigned goods after they had been sold.

Q. It doesn't represent a sale to the B. & D. Wallpaper Company?

A. It doesn't represent the size of that particular shipment, but it does represent a sale, as I understand it.

Q. But what I wanted to get clear was, It was not your understanding that it represented a sale to this B. & D. Wallpaper Company by National Lead? It represented, did it not, an accounting by that concern to National Lead for a withdrawal by it from stock consigned to it?

Mr. MacIntyre: If Your Honor please, I object to this line of questions. It is not voir dire. That is clear. It goes to an analysis of information in the document which is subject only to cross-examination and not to a preliminary examination as to what the document is.

629 Mr. Ewing: It goes, Your Honor, directly to one of the bases for my objections to this document.

Trial Examiner Norwood: What is that?

Mr. Ewing: That is, that this, in the first place, is not a sale, not a single transaction on this sheet is a sale, and, therefore—that is, Exhibit 752-B, for identification.

Trial Examiner Norwood: Well, I suppose it either shows what it is—I don't care to go into the correctness of this document, but you may show how he made it. I don't think you should go into the correctness of this. Your

question should be confined to the matter of identification, just what it is.

Mr. Ewing: I submit I should be entitled to show, Your Honor, facts that would render the document inadmissible.

Mr. MacIntyre: Yes, but, if Your Honor please, he is going far beyond that. He is attempting to go into matters of cross-examination and not actually subject to a proper cross-examination of this witness, because what he is attempting to do is to ask this witness to tell him how somebody in The National Lead Company would have interpreted the basis from which this data is made; that is, the legal effect of it. This witness isn't competent to do that. He is going into the legal effect of some document in The National Lead Company's offices.

630 Trial Examiner Norwood: I am going to overrule the objection and ask the counsel to sketch this so that there will be no question about your question being directed purely to the identification of the document.

Mr. Ewing: My second point is that, regardless of what you call this transaction, or any of them that come under that "Agents" classification here in the case of Exhibit 752B, for identification, you have transactions between National Lead's Boston branch and shipment destinations all lying within the State of Massachusetts. Now, it is my position that under those circumstances, regardless of what you call a transaction, it was intrastate, not interstate; that, therefore, the matter sought to be introduced through this sheet is inadmissible.

Mr. Wright: Your Honor—

Trial Examiner Norwood: Now, listen, I think that the matters that you mentioned there go to the weight of the contents there.

Let us hear Mr. Wright.

Mr. Wright: Your Honor, this is one sheet of an entire document which shows a course of business of The National Lead Company, and on that particular sheet perhaps all the destinations are within the same State from which they were shipped, but that document must be taken as a whole. One sheet cannot be singled out.

631 Mr. Ewing: It cannot be taken as a whole. The witness has sampled many more invoices than are represented on the sheet.

Trial Examiner Norwood: Well, you ask him questions that show just what this document is, not whether it is right

or wrong. You may take that up and disprove all of it and cross-examine him on that. After it has been received in evidence you may examine him further on that, but just direct your questions now to the identification of the document.

Mr. Ewing: Well, is Your Honor ruling—

Trial Examiner Norwood: What it is, not whether it has weight or whether it is correct.

Mr. Ewing: I understand. I am not questioning the correctness of the document at all. My questions, as I said, are for the purpose of bringing out the fact that these particular items on this particular sheet were transactions on a consignment basis, the agency form of contract having gone in evidence yesterday.

Trial Examiner Norwood: I think those are matters which the document shows for itself. That is going into cross-examination on the document. We did not want to do that at this time.

Mr. McDermott: Sir, doesn't that go to the question of the admissibility of the document?

Trial Examiner Norwood: I don't think so.

632 Mr. Wright: Your Honor, these questions go to the question of whether these transactions amount to sales or whether it is a true agency, and that is one of the issues in the case, and certainly we are not going to establish it through the testimony of this witness on identification of the document.

Mr. Ewing: Well, to make the document properly—

Trial Examiner Norwood: I just asked the counsel if he will not stay within that principle as far as he can. It is really difficult for me to say that this question should be asked or it should not with respect to a document of this kind and the many things it shows.

Go ahead. I overruled the question.

Mr. Ewing: Was there an unanswered question, Your Honor?

Mr. McDermott: Yes, there is an objection by Mr. MacIntyre.

Mr. MacIntyre: May we have the original question read?

Trial Examiner Norwood: Yes; that is right.

Mr. MacIntyre: I think that it will then become clear that it is a question asking this witness to interpret the law as to whether the course of action by National Lead

Company establishes these customers as agents or as dealers, customers.

633 Mr. Ewing: I did not ask the witness for any law. I asked him for his understanding.

Mr. MacIntyre: Let us have the question.

Trial Examiner Norwood: Hold everything.

Read the question.

(The Reporter read the last question.)

Trial Examiner Norwood: I believe that the counsel for the Commission is right about that. I think we ought to stay off of questions like that.

I will reverse my ruling and sustain the objection to this question at this time. You may ask him that later on. You just ask questions that will help you in some way in objecting.

Mr. Ewing: In order to cover myself, so far as the record is concerned; might I have an exception to the sustaining of a similar objection to all the other questions that I would have asked with respect to similar pages of the exhibit?

Trial Examiner Norwood: I believe that that gives counsel full advantage of any other questions he should ask as to anything he wants.

Mr. Ewing: That is all I want. I don't want to go through making a record on 167 sheets.

Trial Examiner Norwood: That is right.

Mr. Ewing: Just one more question, Mr. Depue.

By Mr. Ewing:

634 Q. On each of these sheets which you or your assistants prepared, and which have been marked Exhibit 752-B to Z-143, for identification, there is a column with the heading "Destination"?

A. Yes.

Q. And wherever the information is filled in on each of these sheets in that column, is it your testimony that the destination point so given represents the destination point of the shipment with which it is concerned?

A. Yes, but perhaps I should say that I obtained this information from invoices. If there was any information there to indicate that the destination was not the location of the customer, naturally I followed the terminology "Destination" and picked it up, but if there was nothing on the invoices of that nature other than the customer's

address, then those so-called destination points are probably the location of the customer.

Q. And, in any event, that information, just as all the other information on each sheet, is data which you took off the invoices?

A. That is right, with a few exceptions when maybe I also had freight bills.

Q. In every case on these sheets, Mr. Depue, in which you list a transaction with a party which is classified on the sheet as an agent, will you state whether that transaction, or each of those transactions, as indicated by the
635 invoice from which you obtained the data, represented a specific shipment?

A. No, they did not represent separate shipments for a difference of that precise quantity. They were settlements. They were settlements for consigned goods that had been sold.

Mr. Ewing: That is all.

Trial Examiner Norwood: Do counsel object to the exhibit, the proffer?

Mr. Wright: May we have a little redirect, Your Honor?

Trial Examiner Norwood: Yes. Go ahead. Strictly as to the identification.

Mr. Wright: That is right.

Redirect Examination by Mr. Wright.

Q. Mr. Depue, you stated in your last answer that these represented a settlement of accounts of consigned goods. Now, is that answer limited only to those accounts which are headed "Agents" in your tabulations?

A. No, certainly. It is only a dealing with agents.

Q. And all other accounts except those marked "Agents" represent single shipments and sales to customers?

Mr. Ewing: It is a double question, I think, Your Honor. The form of the question I object.

Mr. Wright: I will reframe it. I will withdraw the question.

636 By Mr. Wright:

Q. Then that last answer has no application to any other classification in the tabulation, in the exhibits?

A. Except with respect to the customers classified as agents, all others were—all other transactions are direct

sales, outright, direct sales, and presumably represent separate shipments.

Mr. Wright: That is all.

Mr. Ewing: You don't know, yourself, that they were separate shipments?

The Witness: No. They were separate billings, anyhow.

Mr. Ewing: If Your Honor please, I object to the offer of the documents which have been marked for identification Exhibits 752-B to Z-143, inclusive, in so far as the data appearing thereon relates to the classification "Agents," upon the ground that it appears that they were not what the witness, in response to another question, termed outright, direct sales, and upon the further ground, to the extent that it so appears, that they represented intrastate transactions and not interstate transactions.

Mr. MacIntyre: Well, if Your Honor please, in response to that objection—

Trial Examiner Norwood: Are you through stating that objection? Wait just a moment.

637 Mr. Ewing: I should like to make it perfectly clear, to the extent that the objection is based upon the fact that the transaction is an intrastate one, as indicated on these sheets, that objection is not limited to the "agents" classification, but is to apply to all cases where that fact so appears.

Mr. MacIntyre: If Your Honor please, in consideration of the statement made by Mr. Ewing on this matter of classification of "Agents," I call your attention to page 6 of the mimeographed form of the complaint, and subparagraph 5 appearing thereon, to the following effect: That the respondents, acting in cooperation, agreed to adopt and have adopted, maintained, and used terms and conditions of sale embodied in so-called "consignment" or "agency" agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers selling white lead and white lead paint from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such "consignment" or "agency" agreements.

So, whether or not, therefore, these particular transactions were outright, direct sales, and direct shipments, or handled through persons who were parties to the so-

called "consignment" contracts of National and other respondents, it is immaterial because it does go—
638 whether it is one or the other—to the charge in the complaint to which I have just called your attention.

Mr. Ewing: I fail to see, Your Honor, how it can possibly be said that this data supports the charge that we have agreed to adopt and have adopted and maintained and used terms and conditions of sale embodied in "consignment" contracts. These sheets do not prove that. They do not in any way reflect that.

Trial Examiner Norwood: Let me have some of those sheets while you are talking about them.

Mr. Wright: Your Honor, they have already been introduced in evidence, and will be introduced, more of the actual consignment contracts and the terms of sale embodied and connected thereto, which will—

Trial Examiner Norwood: This shows the condition of consignment. Does it show the rates that were charged up to the consignees as the basis of settlement, and so on? Does it show that, Mr. Wright?

Mr. Wright: Those show the amounts for which the agents, so-called, were billed for the white lead-in-oil which they sold during the preceding month.

Trial Examiner Norwood: Do you have any further statement to make, Mr. Ewing?

Mr. Ewing: No, sir.

Trial Examiner Norwood: Do you have any further
639 statement on that?

Mr. Wright: No, sir. Well, as to the intrastate nature of the transaction, as we have already pointed out, this exhibit must be taken as a whole and a single page which does not show interstate—

Mr. Ewing: Each individual transaction is the subject of my objection, and the fact that he binds these sheets together doesn't make it one integral document.

Trial Examiner Norwood: The counsel has his objection to all the documents that are tabulated that are intrastate transactions and contends that they should not enter into the computation as to figuring averages and total results, and so forth. Is that correct?

Well, I think that it is very clear that the courts and the Commission may consider intrastate transactions along with the other to show what the pricing methods are, if it indicates that, and I shall overrule the objection and

counsel have their exception to all that, and receive the exhibits as marked.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 752-A, 752-B, 752-C, 752-D, 752-E, 752-F, 752-G, 752-H, 752-I, 752-J, 752-K, 752-L, 752-M, 752-N, 752-O, 752-P, 752-Q, 752-R, 752-S, 752-T, 752-U, 752-V, 752-W, 752-X, 752-Y, 752-Z, 752-Z-1, 752-Z-2, 752-Z-3, 752-Z-4, 752-Z-5, 752-Z-6, 752-Z-7,
640 752-Z-8, 752-Z-9, 752-Z-10, 752-Z-11, 752-Z-12, 752-Z-13, 752-Z-14, 752-Z-15, 752-Z-16, 752-Z-17, 752-Z-18, 752-Z-19, 752-Z-20, 752-Z-21, 752-Z-22, 752-Z-23, 752-Z-24, 752-Z-25, 752-Z-26, 752-Z-27, 752-Z-28, 752-Z-29, 752-Z-30, 752-Z-31, 752-Z-32, 752-Z-33, 752-Z-34, 752-Z-35, 752-Z-36, 752-Z-37, 752-Z-38, 752-Z-39, 752-Z-40, 752-Z-41, 752-Z-42, 752-Z-43, 752-Z-44, 752-Z-45, 752-Z-46, 752-Z-47, 752-Z-48, 752-Z-49, 752-Z-50, 752-Z-51, 752-Z-52, 752-Z-53, 752-Z-54, 752-Z-55, 752-Z-56, 752-Z-57, 752-Z-58, 752-Z-59, 752-Z-60, 752-Z-61, 752-Z-62, 752-Z-63, 752-Z-64, 752-Z-65, 752-Z-66, 752-Z-67, 752-Z-68, 752-Z-69, 752-Z-70, 752-Z-71, 752-Z-72, 752-Z-73, 752-Z-74, 752-Z-75, 752-Z-76, 752-Z-77, 752-Z-78, 752-Z-79, 752-Z-80, 752-Z-81, 752-Z-82, 752-Z-83, 752-Z-84, 752-Z-85, 752-Z-86, 752-Z-87, 752-Z-88, 752-Z-89, 752-Z-90, 752-Z-91, 752-Z-92, 752-Z-93, 752-Z-94, 752-Z-95, 752-Z-96, 752-Z-97, 752-Z-98, 752-Z-99, 752-Z-100, 752-Z-101, 752-Z-102, 752-Z-103, 752-Z-104, 752-Z-105, 752-Z-106, 752-Z-107, 752-Z-108, 752-Z-109, 752-Z-110, 752-Z-111, 752-Z-112, 752-Z-113, 752-Z-114, 752Z-115, 752-Z-116, 752-Z-117, 752-Z-118, 752-Z-119, 752-Z-120, 752-Z-121, 752-Z-122, 752-Z-123, 752-Z-124, 752-Z-125, 752-Z-126, 752-Z-127, 752-Z-128, 752-Z-129, 752-Z-130, 752-Z-131, 752-Z-132,
641 752-Z-133, 752-Z-134, 752-Z-135, 752-Z-136, 752-Z-137, 752-Z-138, 752-Z-139, 752-Z-140, 752-Z-141, 752-Z-142, 752-Z-143, and 752-Z-144, were received in evidence.)

Mr. Wood: I haven't made an objection on behalf of Eagle-Picher, but I do object to these exhibits. There were similar exhibits that were taken from the records of Eagle-Picher. I don't want to anticipate my objection at that time, but I wish to go on the record. It may shorten it slightly if I stated that there are no other grounds for objection.

I object to the use of the word "destination" there. It is an interpretative word. See, these words were prepared weeks or months after the shipment, and currently there is an effort in the use of that word "destination" to create

a different implication as to time, as if the order were sent and the price set, and then the shipment came later, whereas the shipment preceded the invoice in fact.

Trial Examiner Norwood: Well, as I take it, this witness is ready now to explain this exhibit. You may go into his testimony, and then he may be cross-examined on that, and the counsel may bring out these further particulars. All we have to decide now is, has it sufficient relevance and reliability to receive into evidence for our consideration?

Mr. Wright: I would like that this be marked for identification as Commissioner's Exhibit 753-A and B.

642 (The document referred to was marked for identification Commission's Exhibit No. 753-A and 753-B.)

Trial Examiner Norwood: Do you want a recess now?

Mr. Wright: Well, I will finish this witness in just about two minutes, and I don't think there will be any objection on the part of counsel.

Trial Examiner Norwood: All right.

Direct Examination (Resumed).

By Mr. Wright:

Q. I hand you herewith a document marked for identification as Commission's Exhibit 753-A and B, and ask you to state what that is.

Mr. Ewing: I concede that is my letter to Mr. Depue with the enclosure which speaks for itself. I have no objection whatsoever.

Mr. McDermott: What is the date of it?

Mr. Wright: September 18, 1945.

I offer that in evidence.

Trial Examiner Norwood: It is received as marked.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 753-A and 753-B, was received in evidence.)

Mr. Wright: I have no other question of this witness.

Trial Examiner Norwood: We will have a five-

643 minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed, gentlemen.

Cross-Examination by Mr. Ewing.

Q. Mr. Depue, when you went to National Lead Company to make the examination of the invoices to which we have referred, you asked for the production of all of the invoices relating to transactions in certain cities, did you not?

A. I did.

Q. About how many cities were involved?

A. Sixty-seven.

Q. Did you, yourself, select the cities?

A. No.

Q. Do you know who did?

A. Yes.

Q. Will you tell us, please, sir?

A. I believe Mr. MacIntyre.

Q. Do you know, Mr. Depue, the basis for the singling out and selection of these particular cities?

A. No, I don't know. I, of course, have my opinion.

Q. Will you give us your opinion?

Mr. Wright: I object, Your Honor.

Trial Examiner Norwood: I don't see how one man can tell what another man thinks.

644 Objection sustained.

By Mr. Ewing:

Q. Did you have any conversation with Mr. MacIntyre with respect to the selection of these cities?

A. I did not.

Q. Or with anyone else?

A. No, I did not.

Q. Am I correct in understanding, then, that Mr. MacIntyre asked you to examine the invoices during the three months' periods involved, which might be produced with respect to these 67 localities?

A. That is right.

Q. You have just testified that the exhibits which have been produced and identified related to 67 cities. Originally, how many localities did you call upon us to produce invoices from?

A. I don't remember.

Q. Well, do you know whether there were more than 67?

A. I don't remember now whether these sheets cover-

ing 67 are the 67 that I asked for, but I think these cover 67 for which the invoices were supplied. I may be wrong.

Q. If I told you that according to my best recollection the original list of cities was 106, would that refresh your recollection?

A. You are probably right; I don't know.

Q. And, in fact, we produced invoices related only 645 to the 67 of which you have a read because we had no invoices in the other localities during that period?

A. I believe that is right.

Q. Now, you have testified that in going over these invoices you made your own selection which you recorded, or your associates recorded, in these sheets; is that right?

A. That is correct.

Q. What is the purpose that you had in mind in making that selection?

A. I endeavored to record on these sheets the various prices charged each class of csutomer for white lead sold in the respective sizes of containers or in different quantities in each of these localities.

Q. The sheets which relate to transactions of the Boston branch, which have been marked Exhibit 752-B, C, D, E, F, and G, do not purport to set forth the data that each and every invoice of the Boston branch, produced for your inspection, showed relating to the three three months' periods, do they?

A. No, not all of them are recorded here.

Q. Now, in selecting the particular transactions which are recorded on the six sheets that I have just mentioned, will you tell us the criteria which you had in mind in making that selection?

Mr. MacIntyre: I object. There is no showing that there was any particular criteria used. That should be 646 shown before this question is asked, as to whether there was such a thing.

Trial Examiner Norwood: Objection overruled. He may tell us everything he can about these.

Answer the question.

The Witness: Well, I might say that I would go through those bunches that came to me and sort them out by the different prices shown, and then give consideration to the quantities involved and endeavor to get a record of all of the different prices and a representative sample of the quantities at which those different prices were charged

for each class of customer in each of those periods, and so as a whole get, as I said before, a representative sample of the sales in each of these locations at the different prices for each class of customer.

By Mr. Ewing:

Q. What would make you, for example, in the case of this first sheet, 752-B, select invoice 219, the B. & D. Wallpaper Company, and leave out some other invoice?

A. Well, that is a pretty good illustration. You find the first two items are—or, rather, you will find the first and third refer to just one 12½-pound keg each, and on the fourth line there is 25 pounds, which means two of those 12½-pound kegs, and a bill with 50 pounds, which means four of those kegs, and all the way up to 137½, and
647 so it shows that the price was the same for those different quantities in that particular size container, and, likewise, with these other size containers at the respective prices.

Trial Examiner Norwood: Is the second column the price per 100, $10.50?

The Witness: Yes. In other words, it shows that size of the container to a certain extent at least governs the price differentials rather than the quantity, and the whole thing, of course, was to show the factors that govern the price differential.

By Mr. Ewing:

Q. When you say to show the factors which govern the price differential—

A. In so far as they are reflected by the invoice.

Q. What factors have you in mind?

A. Quantities and containers and customer classes.

Q. Now, in the case of your examination of the invoices in which you would discard some and retain others, except in the case of invoices relating to transactions with agents, you found sometimes, did you not, that an invoice might govern not only white lead-in-oil, say, but also some other product of The National Lead Company, such as red lead, or some other product. Is that correct?

A. Yes.

Q. And when you recorded from any such invoice
648 the information on this sheet, if it was the subject of your selection, you recorded, did you not, only the data relating to white lead?

A. That is right.

Q. And not the data relating to any other?

A. That is right.

Q. It is a fact, is it not, Mr. Depue, that the invoices relating to transactions with agents related to white lead only?

A. Well, I don't remember. Anyhow, there is nothing here except about white lead.

Mr. Wright: I object to that line of questioning because the sheets show the products to which they relate.

Trial Examiner Norwood: I think you are drawing the line too closely there. Let him tell us about this tabulation and how he made it.

The objection is overruled.

The Witness: I think I answered.

Mr. Ewing: I think you did.

By Mr. Ewing:

Q. Mr. Depue, did you have anything to do with the selection of the periods for which invoices were called for?

A. No.

Q. Do you know the reason for the selection of these particular periods?

649 A. I think they are related to the time when price changes occurred.

Mr. MacIntyre: If Your Honor please, I move that the last answer of the witness be stricken unless it is clearly shown that it is based on knowledge instead of supposition.

May we have it read?

Trial Examiner Norwood: You may examine him on that point.

Read the answer.

(The reporter read the answer.)

Mr. Wright: The answer still shows that it is not of his own knowledge.

Trial Examiner Norwood: The motion is allowed.

By Mr. Ewing:

Q. Do you know, Mr. Depue, whether there were other prices, that is, prices other than as indicated on these sheets, for any other class of customer?

A. No; I endeavored to get a complete record of the different prices that appeared on the invoices.

Mr. Ewing: That is all.

Redirect Examination by Mr. Wright.

Q. Mr. Depue, you referred several times to transactions in white lead. Is it not true that there are also transactions in other pigments such as red lead and red
650 sulphate, which are interspersed through the exhibit and recorded?

A. I don't think there are. I believe there are sales to paint manufacturers involving some kind of a compound.

Q. The invoices which were brought to you by officials of the National Lead Company for the purpose of examination were sorted as to the various branches and subsidiaries of The National Lead Company, were they, when they were handed to you?

A. No, they came to me in bunches pertaining to the cities listed for which we asked information. Obviously, they came from the districts which controlled the sales in these cities.

Q. And you then inserted them for purposes of this tabulation into the various branches and subsidiaries of The National Lead Company?

A. Oh, yes, it shows the branch.

Q. You testified that you recorded certain of the invoices from the various branches and did not record the other invoices?

A. Yes.

Q. As to the Boston branch, for instance, can you state what proportion of those that were handed you you recorded, and can you state that generally as to the other branches?

A. I don't remember the proportions of representation with respect to each of these, but as I said once before, in order to get what I recorded as a representative
651 sample I may have taken three-quarters of the bills from one city and, in other instances, maybe only one-quarter in order to get such a sample. Which was true in Boston I wouldn't say, but I believe perhaps Boston might have been a half, and I have a pretty elaborate sample here for Boston.

Q. Mr. Depue, did the invoices which you did not record show any differences on their face as to prices or terms of sale to customers of the same classification?

A. No, indeed. This record shows the prices reflected on those invoices—not all the invoices, but there were no

different invoices than those recorded here that were relevant, at least. It did not include all products.

Trial Examiner Norwood: Those you discarded were duplicates?

The Witness: Exactly. It would have only encumbered the record, and, moreover, it would have made it much more burdensome.

Mr. Wright: I have no further questions.

Recross Examination by Mr. Ewing.

Q. Mr. Depue, you say that you and two of your associates made this particular examination?

A. That is right.

Q. You made it commencing early in June, 1945, did you not?

A. I think so.

652 Q. And the examination continued until late in July, did it not?

A. It may have. I thought it was about six weeks.

Q. And during that time were the three of you at work on that job?

A. Continuously, yes, in your office.

Q. In The National Lead office?

A. Yes.

Q. So that the examination of the invoices presented to you involving the three three months' periods, and the accounts called for and the recording of the data which you elected to take therefrom, took substantially the time of you three men for six weeks?

A. Yes.

Mr. Ewing: That is all.

Trial Examiner Norwood: Thank you, Mr. Depue.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wright: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed, gentlemen.

Mr. Wright: Your Honor, at the hearing yesterday we received as to Commission's Exhibit, for identification,

653 71-A and B and some additional numbers for the making of an additional exhibit, so I ask that these papers be marked for identification Commission's Exhibits 75-C, D, E, and F.

(The documents referred to were marked for identification as Commission's Exhibits Nos. 751-C, 751-D, 751-E, and 751-F.)

Mr. Wright: Do you care to make a statement about these, Mr. Ewing?

Mr. Ewing: Commission's Exhibit 751-A and B, for identification, are documents prepared by National Lead Company at the request of Mr. Carl H. Depue, and furnished by counsel for The National Lead Company to him.

Commission's Exhibit 751-C and D, for identification, are documents prepared by National Lead Company at the request of the Trial Attorney for the Federal Trade Commission, and furnished to him, representing corrections relating to Exhibit 751-A and B, for identification.

Commission's Exhibit 751-E and F, for identification, is a document prepared by National Lead Company at the request of the Trial Attorney for the Commission and furnished by counsel for National Lead Company to him.

Mr. MacIntyre: May I observe, Mr. Ewing, that 751-C and D was not prepared at the request of counsel for the Commission, and you agree it was not?

Mr. Ewing: If I referred to that as being prepared at your request, I was in error.

654 Mr. MacIntyre: Counsel for the National Lead Company prepared that as an explanation of theirs of material appearing on Commission's Exhibit, for identification, 751-A and B.

Is that correct?

Mr. Ewing: That is correct.

Mr. Wright: I now offer Commission's Exhibit 751-A through F into evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: These are offered as statements by The National Lead Company as to freight rates to destinations shown thereon.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 751-A, 751-B, 751-C, 751-D, 751-E, and 751-F, were received in evidence.)

Mr. Hinds: On behalf of Glidden, I object so far as this shows freight rates, as being hearsay evidence as to Glidden. Records made by someone else not here as a witness in court, and subject to cross-examination, are hearsay and objectionable and incompetent as against Glidden.

Trial Examiner Norwood: You mean a written statement? These are written tabulations of freight rates?

Mr. Hinds: I haven't seen the document, but I
655 heard counsel say they were tabulations of freight rates.

Trial Examiner Norwood: Made by someone who is not sworn here and may not be cross-examined?

Mr. Hinds: Yes.

Trial Examiner Norwood: Freight rates are a matter of public information and they may be checked.

Mr. Wright: These are offered as a statement of freight rates supplied to the Commission by National Lead Company.

Mr. Hinds: No objection, then, if not offered against Glidden.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I offer into evidence, Your Honor, Commission's Exhibit 749 as a document supplied by The National Lead Company to the Federal Trade Commission showing the location of factories, warehouses, and routing of shipments of lead pigments by The National Lead Company.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I have no objection to 749. I object to any characterization of it.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification
656 COMMISSION'S EXHIBIT NO. 749, was received in evidence.

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit 750, for identification, which is a letter from The National Lead Company to the Federal Trade Commission giving shipping weights of containers of white lead-in-oil and dry white lead.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 750, was received in evidence.)

Mr. Wright: Your Honor, this afternoon we planned to take up documents relating to the Eagle-Picher Company. We have similar tabulations of invoice material

which we secured from the Eagle-Picher Company, and I request that it be marked for identification during the noon recess, and that will be Commission's Exhibit, for identification, 754-A through 754-Z-60.

Trial Examiner Norwood: That may be done.

(The documents referred to were marked for identification Commission's Exhibits Nos. 754-A, 754-B, 754-C, 754-D, 754-E, 754-F, 754-G, 754-H, 754-I, 754-J, 754-K, 754-L, 754-M, 754-N, 754-O, 754-P, 754-Q, 754-R, 754-S, 754-T, 754-U, 754-V, 754-W, 754-X, 754-Y, 754-Z, 754-Z-1,
657 754-Z-2, 754-Z-3, 754-Z-4, 754-Z-5, 754-Z-6, 754-Z-7, 754-Z-8, 754-Z-9, 754-Z-10, 754-Z-11, 754-Z-12, 754-Z-13, 754-Z-14, 754-Z-15, 754-Z-16, 754-Z-17, 754-Z-18, 754-Z-19, 754-Z-20, 754-Z-21, 754-Z-22, 754-Z-23, 754-Z-24, 754-Z-25, 754-Z-26, 754-Z-27, 754-Z-28, 754-Z-29, 754-Z-30, 754-Z-31, 754-Z-32, 754-Z-33, 754-Z-34, 754-Z-35, 754-Z-36, 754-Z-37, 754-Z-38, 754-Z-39, 754-Z-40, 754-Z-41, 754-Z-42, 754-Z-43, 754-Z-44, 754-Z-45, 754-Z-46, 754-Z-47, 754-Z-48, 754-Z-49, 754-Z-50, 754-Z-51, 754-Z-52, 754-Z-53, 754-Z-54, 754-Z-55, 754-Z-56, 754-Z-57, 754-Z-58, 754-Z-59, and 754-Z-60.)

Mr. Wright: Your Honor, we would like to offer now some exhibits on Eagle-Picher Company.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, heretofore marked for identification, as Exhibit 665. It is offered as a statement of respondent Eagle-Picher Lead Company and Eagle-Picher Sales Company, showing the amounts of sales of white lead-in-oil and dry white lead made during the year 1940.

That exhibit was identified at page 343 of the record.

Mr. Wood: No objection.

658 Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 665, was received in evidence.)

Mr. MacIntyre: I now offer into the record Commission's Exhibit, for identification, 585 as a photostat of a map showing zone boundaries of zones used by Eagle-Picher Lead Company, and as furnished by a representative of that company to representatives of the Federal Trade Commission on December 4, 1940.

That is covered by provision of a stipulation in the record at page 207.

Mr. Wood: It is understood, isn't it, Mr. MacIntyre, that this map applies only to white lead-in-oil and nothing else?

Mr. MacIntyre: I don't know that I am ready to agree that it is to be so limited. I would say that we are offering it to apply to such lead pigments as the record, when it is closed, will show that it applies to.

We know it applies to white lead; we know that the pricing practices of Eagle-Picher with respect to some other lead pigments are shown to some extent to coincide with this.

Mr. Wood: You represented this as having been presented to the Commission by a representative of Eagle-Picher. It was not represented, was it, as covering
659 anything but white lead-in-oil?

Mr. MacIntyre: I don't believe it was so represented at that time.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 585, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: I now offer into evidence Commission's Exhibit, for identification, 586 as a photostatic map showing zone boundaries of the Eagle-Picher Lead Company and Eagle-Picher Sales Company, as furnished by an official of that company to a representative of the Commission on December 30, 1942.

Mr. McDermott: Transcript, please?

Mr. MacIntyre: At page 208.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 586, was received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit 587 as a zone map of the
660 Eagle-Picher Company as furnished by Mr. Hayt, an official of that company, to a representative of the Commission on December 30, 1942, record pages 116 and 306.

Trial Examiner Norwood: Any objections?

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 587, was received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, for identification, 586 as a zone map of the Eagle-Picher Company as furnished by Mr. Hayt, an official of that company, to R. T. Dunn, a representative of the Federal Trade Commission, on December 29, 1943.

See record pages 186 and 212.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 588, was received in evidence:)

Mr. MacIntyre: I now offer into the record Commission's Exhibit, for identification, 589-A and B, as a statement of the Eagle-Picher Sales Company in explanation of its zones; as furnished by Mr. Hayt, an official of that company, to R. T. Dunn, a representative of the Federal
661 Trade Commission on December 30, 1942, record pages 188 and 208.

Trial Examiner Norwood: Any objection?

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT 589-A and 589-B, was received in evidence.)

Mr. Wood: There is a slight discrepancy in dates I wanted to clear up.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: I now offer into the record Commission's Exhibit 590-A to L as a statement of respondent Eagle-Picher in explanation of its zones, and identification of symbols used in connection with its zoning practice, as furnished by an official of that company to a representative of the Federal Trade Commission on December 30, 1942, see record pages 188 and 208.

Mr. Wood: This document is identified on page 208 of the record, and there is no objection to the document, but I prefer the identification that is in the record already.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 590-A, 590-B, 662 590-C, 590-D, 590-E, 590-F, 590-G, 590-H, 590-I, 590-J, 590-K, and 590-L, were received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, for identification, 626, 627, 628, 629-A through C, 630-A through C, 631-A through F, 632-A through C, 633-A through C, 634-A through C, 635-A through D, 636-A through D, 637-A through D, 638-A through C, 639-A through C, 640-A through C, 641-A through C, 642-A through C, 643-A through C, as statements of provisions which were included in so-called agency or consignment contracts by respondent Eagle-Picher.

These documents have been marked for identification at record page 189 and identified at page 220.

They are statements of those provisions as furnished representatives of the Federal Trade Commission by representatives of the Eagle-Picher Company, respondent.

Trial Examiner Norwood: Any objection?

Mr. Wood: No objection.

I will put it this way: The documents are genuine, they are identified at the previous point in the record, and as there identified there is no objection to them.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 626, 627, 628, 629-A, 629-B, 629-C, 630-A, 630-B, 630-C, 631-A, 631-B, 631-C, 631-D, 631-E, 631-F, 632-A, 632-B, 632-C, 633-A, 633-B, 663 633-C, 634-A, 634-B, 634-C, 635-A, 635-B, 635-C, 635-D, 636-A, 636-B, 636-C, 636-D, 637-A, 637-B, 637-C, 638-A, 638-B, 638-C, 639-A, 639-B, 639-C, 640-A, 640-B, 640-C, 641-A, 641-B, 641-C, 642-A, 642-B, 642-C, 643-A, 643-B, and 643-C, were received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, for identification, 658 as a statement furnished by representatives of Eagle-Picher to representatives of the Federal Trade Commission of the dates on which price changes were made by respondent Eagle-Picher during the period December 17, 1926, through October 1, 1939, on white lead-in-oil.

That exhibit was marked for identification on page 189, and identified at pages 206 and 207.

Mr. Wood: Mr. MacIntyre calls our attention to the fact that he thinks there is a mistake in the record as to the dates.

Mr. MacIntyre: I think the ones I read off are the correct ones.

Mr. Wood: If the record is corrected to read October 1, 1939, instead of August 1, 1940, that would straighten things out.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

664 Trial Examiner Norwood: Commission's Exhibit 658 is received in evidence, subject to check.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 658 was received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 660-A thorugh 660-Z-2 as a statement of respondent Eagle-Picher of its records of its announcements of its prices as quoted by it to its customers in various locations.

Those documents have been marked at the record page 189-A and identified at record page 221.

Mr. Wood: These documents were all identified in the record, and, as so identified, there is no objection to them.

Trial Examiner Norwood: They are received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 660-A, 660-B, 660-C, 660-D, 660-E, 660-F, 660-G, 660-H, 660-I, 660-J, 660-K, 660-L, 660-M, 660-N, 660-O, 660-P, 660-Q, 660-R, 660-S, 660-T, 660-U, 660-V, 660-W, 660-X, 660-Y, 660-Z, 660-Z-1, and 660-Z-2, were received in evidence.)

Mr. Wood: Off the record.

665 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: If Your Honor please, we wish to introduce into evidence Commission's Exhibit heretofore marked for identification as 644.

I offer this as a statement of the Eagle-Picher Sales Company showing its distribution, dated December 4, 1940, and showing prices in effect for customers on various classes of its distribution system as of October 1, 1939.

I refer to the record, pages 189 and 206.

Trial Examiner Norwood: Any objection?

Mr. Wood: There is no objection to it. I would like, in letting it in, to comment that Mr. Serviss prepared this for his own use, and it is not a document used as a

part of the sales policy of the company, Mr. Serviss being house counsel.

Trial Examiner Norwood: We will receive it as marked, and not as described.

Mr. MacIntyre: I respectfully refer Your Honor to the statement on the record appearing at pages 206 and 207.

Trial Examiner Norwood: That is what binds. Counsel is merely objecting to the other counsel's description at times. I merely want to state these exhibits are received as marked, and not necessarily as described by either counsel on either side.

666 Mr. MacIntyre: I am stating what my offer is and what it is offered as.

Trial Examiner Norwood: Your statement is not evidence.

Mr. MacIntyre: But I am telling you why I am offering it, and for what purpose, and if there is no basis in the record for receiving it as such it, of course, could not be received as such.

Trial Examiner Norwood: We are receiving the exhibit for what it is. You may be 100 per cent right, of course. The manner of presenting those will help us in studying the record.

It is received as marked, Commission's Exhibit 644.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 644, was received in evidence.)

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: Your Honor, we wish to offer into evidence Commission's Exhibits, for identification, 730-A and B, as a statement of the respondent Eagle-Picher of freight rates applying between destinations shown thereon.

Trial Examiner Norwood: Any objection?

Mr. Wood: I can't agree that freight rates apply between two destinations.

Mr. MacIntyre: Probably I should say between
667 the points of origin and the points of destination as shown on the exhibits.

Trial Examiner Norwood: Is there any objection?

(No response.)

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 730-A and 730-B, were received in evidence.)

Mr. MacIntyre: Your Honor, we wish to offer into evidence Commission's Exhibit, for identification, 647.

I offer this as a statement of a quotation and a statement of terms and conditions of sale made by Eagle-Picher Sales Company, which was furnished to a representative of the Federal Trade Commission by a representative of the National Lead Company.

Mr. Wood: What page of the record?

Mr. MacIntyre: The testimony of R. T. Dunn to the effect he secured that from the National Lead Company—

Trial Examiner Norwood: What page?

Mr. Wood: Your Honor, I am going to object to this exhibit as inadmissible until such time as it is explained and connected with the case.

Trial Examiner Norwood: In other words, counsel objects to it as irrelevant. Will counsel go on and complete his proffer and I will withhold the ruling on this.

668 Mr. MacIntyre: I am unable to give you the reference to the record on that at the moment, but it is in Mr. Dunn's testimony as to the source, as he put it.

Trial Examiner Norwood: Could you give me the date?

Mr. MacIntyre: He secured this from Mr. Rowe of The National Lead Company on April 23, 1943.

Trial Examiner Norwood: I mean the date of the record.

Mr. MacIntyre: He was on the stand more than one day. I will have to search for it.

Trial Examiner Norwood: I will reserve the ruling on 647.

Mr. MacIntyre: Mr. Wright has a group of exhibits he wants to offer before the noon hour.

Trial Examiner Norwood: Can't these go over?

Mr. MacIntyre: I would like for these to be offered before we adjourn so that if you want to reserve ruling on any—

Trial Examiner Norwood: How many are there?

Mr. Wright: About 25.

Trial Examiner Norwood: Go ahead.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit, for identification, 684, which is a carbon copy of a memorandum to Mr. Maston, vice-president of Eagle-Picher Company from J. Stranad, dated August

669 17, 1933, which is identified at page 204 of the record.

And I also offer in evidence Commission's Exhibit

685—

Mr. Wood: Just a moment.

Mr. Wright: This is related to the prior exhibit, which is a letter from the Atlantic branch of The National Lead Company to Dutch Boy Agents, which appears to be an enclosure to Commission's Exhibit 684.

I also offer Commission's Exhibit 686, which is a letter from W. E. Maston to J. Stranad of the New York office, under date of August 21, 1933, which relates to 684 and 685.

At the same time I offer Commission's Exhibit 702, which is the original of Commission's Exhibit 686, identified at page 214 of the record.

Trial Examiner Norwood: What is the object in offering the original and the duplicate?

Mr. Wright: It was secured in different places, and identified at different places in the record. They are covered by the stipulation.

Mr. Wood: These documents, Your Honor, are stipulated as to their authenticity. I don't want to burden the record with a great many further objections because there is no objection, but I dislike a case in which just quantities of documents go into the record without any explanation of the documents, so that when the case 670 is over and the time comes for briefing counsel can pick them out and draw all sorts of inferences and implications.

I think this type of thing should be kept out of evidence unless it is connected with the case in some way.

Mr. Wright: Your Honor, that evidence is certainly relevant to the issues. The documents show on their face conversations between representatives of National Lead Company and Eagle-Picher Lead Company regarding the subject of agency.

Trial Examiner Norwood: Complete your proffer and I will look over these during the recess, and I may discard some of them.

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit, for identification, 687, which is a statement of the organization and officers of the Eagle-Picher Company, under date of July 30, 1941.

I want to state for the record at this time Commission's Exhibit 687 is properly identified at page 287 of the transcript. There is on page 205 of the transcript an identification of 687-A, B, C, and also 688-A, B, and C,

and the record is in error on the listing of those exhibits on page 205 of the transcript.

Trial Examiner Norwood: How is that?

Mr. Wright: Apparently in the record Commission's Exhibit 687 is identified on two different pages as two different documents.

671 The proper identification is on page 207, and the purported identification on page 205 is in error.

Trial Examiner Norwood: All right.

I warn you again, however, to list those corrections that are to be made because they have to be submitted in written lists.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 687, was received in evidence.)

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit, for identification, No. 688, which is identified on page 207 of the record, which is a price schedule of the Eagle-Picher Company for white lead-in-oil, as of May 1, 1941, and that is identified properly at page 207 of the record, and purported identification on page 205 is in error.

Mr. Wood: No objection.

Trial Examiner Norwood: Commission's Exhibit 688 is received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 688, was received in evidence.)

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit heretofore marked for identification No. 691, which is a photostat of a letter from Frank L. Chinery, chief chemist of Eagle-Picher, to Carleton H. Rose, of The National Lead Comapny, under date of November 29, 1940, and Commission's Exhibit 692, which is a copy of a letter under date of November 20, 1940, from Carleton H. Rose of The National Lead Com-

672 pany to Mr. Chinery of the Eagle-Picher Company, which are identified at pages 209 and 210 of the record.

Mr. Wood: These documents are genuine, but I object to them being received in evidence because I think the documents standing alone as evidence are fallacious. If they can be connected into the case, or their significance brought in, they are unquestionably genuine, but standing alone they are trivial and unrelevant.

Trial Examiner Norwood: They are admitted subject to connection.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 691 and 692 were received in evidence.)

Mr. Wood: I object to a whole mass of unconnected detail on this case.

Trial Examiner Norwood: I shall take these and look over them, and if I can't see their relevance we will lay them aside until their relevancy appears.

Mr. Wright: I now offer in evidence Commission's Exhibit 695, which is a copy of a letter under date of April 15, 1937, to Eagle white lead and oil distributors from the Eagle-Picher Sales Company, signed by H. Bendelari, head of the white lead and oil division, which was produced for a representative of the Commission by Mr. Rowe of National Lead Company, and identified at page 211 of the record.

673 Trial Examiner Norwood: How many more have you got there?

Mr. Wright: About 12.

Trial Examiner Norwood: It is one o'clock. I don't see why they can't wait until this afternoon.

Mr. MacIntyre: Can we adjourn until 2:30?

Trial Examiner Norwood: Yes. We will recess until 2:30.

(Thereupon, at 1 o'clock p. m., a recess was taken in the hearing until 2:30 o'clock p. m. of the same day.)

674 Afternoon Session, 2:30 P. M.

Trial Examiner Norwood: The hearing will come to order.

I have read these exhibits, Commission's Exhibits, for identification, 647, 684, 685, 686, 702, 691, 692, and 695. I did not mark 687. Where is that?

Mr. DuBose: 687 and 688 are in evidence, I believe.

Mr. McDermott: There was no objection to 687, sir.

Trial Examiner Norwood: You are sure 687 is in evidence?

Mr. McDermott: Yes, sir.

Trial Examiner Norwood: The ones I have enumerated, the objections are overruled and they are received in evidence.

(The documents heretofore marked for identification

COMMISSION'S EXHIBITS NOS. 647, 684, 685, 686, 702, 691, 692, and 695, were received in evidence.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: May we wait for a few minutes until Mr. Wright returns?

Trial Examiner Norwood: Yes.

(There was a short recess taken.)

Trial Examiner Norwood: Are you ready?

Mr. Wright: Your Honor, I am sorry I had to step
675 out of the room to get a paper.

Were any of these documents you had under consideration rejected?

Trial Examiner Norwood: No. No. They were all received in evidence.

Mr. Wright: Thank you, sir.

Your Honor, I offer into evidence as Commission's Exhibits 696 and 697—Exhibit 696 is a photostat of an original letter from W. R. Dice, the executive vice-president of the Eagle-Picher Lead Company, to F. E. Wormser, the secretary of the Lead Industry Association, under date of November 16, 1937.

697 is a photostat of a carbon copy of a letter from Mr. Wormser to Mr. Dice, under date of November 19, 1937, identified at page 211 of the record.

Mr. Wood: This is objected to, Your Honor, as irrelevant to the issues of the case, though I concede that with appropriate oral testimony it might become pertinent later, but in the absence of testimony I see no relevance in it.

Trial Examiner Norwood: I will overrule the objections and receive them subject to connection.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 696 and 697 were received in evidence.)

676 Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 700-A and B, which is identified on page 213 of the transcript, which is a letter from the vice-president and treasurer of the Eagle-Picher Lead Company to a representative of the Federal Trade Commission, under date of June 4, 1943, showing a transcript from the records of the stock transfer agent of the Eagle-Picher Company with the holdings of Eagle-Picher stock of Edward J. Cornish in The National Lead Company.

Trial Examiner Norwood: What is the number? 700-A and B?

Mr. Wood: 700-A and B. I object to this, Your Honor. I brought this same point up yesterday, but I didn't make myself clear on the record.

The Federal Trade Commission Act does not include within the jurisdiction of the Commission offenses against the Sherman Act. That was specifically excluded by reason of the court decision that a price-fixing conspiracy is considered an unfair method of competition, so that we have gotten into the habit of thinking of offenses against the Sherman Act as being co-extensive with the jurisdiction of the Commission.

Now, section 2 of the Sherman Act includes the attempt to monopolize as a violation of the Sherman Act, but the point I wanted to make yesterday, and make now, is that

677 the intent of National, even if it had the intent to monopolize, cannot be an unfair method of competition. In other words, how can National's intent, whatever it was, be an unfair method of competition?

So I object to all evidence relating to National's intent to monopolize because National's evil thoughts have nothing to do with Eagle-Picher.

Trial Examiner Norwood: They alleged an attempt; didn't they?

Mr. Wright: Yes, sir; the complaint alleges an attempt to monopolize, and an intent on the part of The National Lead Company to monopolize this business.

Mr. Wood: That isn't an unfair method of competition, though.

Trial Examiner Norwood: No. No.

Mr. Wright: It goes to the essential conspiracy in the monopolization case.

Trial Examiner Norwood: No. I don't think that just to prove the intent would be a violation of the Sherman Act, but I think counsel is wrong about saying that the Federal Trade Commission Act is not as extensive as the Sherman Act. It is much more extensive because the Federal Trade Commission can proceed before a monopoly is formed.

Mr. Wood: I will put it this way—

Trial Examiner Norwood: I can check the capacity and tendency.

678 Mr. Wood: Yes; but I will try—

Trial Examiner Norwood: The policy underlying these anti-trust actions are to be considered by the Federal Trade Commission in determining what practices are unfair. So it is really broader.

Mr. Wood: Yes. The point is that Congress in passing the Federal Trade Commission Act gave the Commission jurisdiction as to enforcement of the Clayton Act but not jurisdiction as to enforcement of the Sherman Act, so it is only part of the offenses comprehended by the Sherman Act which are also under the Federal Trade Commission Act. So in other respects it may be broader, as you say.

Mr. MacIntyre: If Your Honor please, we are not proceeding here under the Sherman Act.

Trial Examiner Norwood: No.

Mr. MacIntyre: We are proceeding under a complaint which alleges a violation of section 5 of the Federal Trade Commission Act.

Trial Examiner Norwood: That is what he says. He says we are proceeding under section 5. He is right about that.

Mr. MacIntyre: Your Honor, I will refer you to page 4, paragraph seven, of the mimeographed copy of the complaint, where it is charged that The National Lead Company embarked upon the execution of a plan and
679 program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale, and distribution of white lead, and then in subparagraph 6 thereto, on page 5 of the complaint, the further allegation is made that National has also secured a control over a substantial part of the capital stock of Eagle-Picher Lead Company in connection with the execution of that plan, and this exhibit that is now before you is relevant to those two charges.

Trial Examiner Norwood: Mr. Cornish was an officer of National; was he?

Mr. Ewing: That is correct.

Trial Examiner Norwood: Does this have any connection with exhibits that were rejected yesterday?

Mr. Wright: Your Honor, I was about to re-offer Commission's Exhibits 527 and 528 which were considered yesterday, and I would like to do so now while the offer of this other exhibit is pending, that they all three be considered together, and I now make that offer.

Mr. Ewing: The other earlier exhibits that were rejected yesterday have absolutely nothing to do with that transaction.

Mr. Wright: Your Honor, these are letters to Mr. Cornish and Mr. Carter at the time when Mr. Cornish was

shown to have 44,900 shares of Eagle-Picher stock on their stock transfer register. You will notice on Com-
680 mission's Exhibits 527 and 528 at the top they are marked "From the files of FMC." I think it is fair to infer that those are from the files of F. M. Carter, who was at the time president of The National Lead Company.

Trial Examiner Norwood: This tends to show that Mr. Cornish owned stock in Eagle-Picher, and also that he was merely the trustee for National. This one is all right. I don't see how this comes into the picture.

Mr. MacIntyre: If Your Honor please, during the very time when Mr. Cornish was holding this 44,900 shares, which we will show before this record is closed constituted more than 5 percent of the outstanding voting capital stock of Eagle-Picher at that time, while it was owned, nevertheless, did not constitute the total that was sought by National, National seeking, as the other two documents show, approximately a half a million, or more than 50 percent.

Trial Examiner Norwood: Yes; but these two letters from this broker here try to sell National some of this stock. I don't see that that is connected up with this thing.

Mr. Ewing: And the broker testified, Your Honor will recall, nothing came of his attempt to sell.

Mr. Wright: That is true. We realize nothing came of it, but at the same time those letters show a prior course of dealing between Mr. Chatfield, Mr. Carter, and Mr. Cornish, and they were letters kept in the files of The
681 National Lead Company and produced by them under subpoena.

Trial Examiner Norwood: I don't think it shows anything at all except what it shows; that is, that Chatfield wrote to these people and wanted to sell them stock.

Mr. Wright: Referring to the 50,000 shares of stock that were already held.

Trial Examiner Norwood: This is all right, but this does not add anything to the connection with that. Now, you may be able to connect that. We have taken in a lot of stuff here, but it hasn't been connected with it, but I shall overrule the objection and receive Commission's Exhibits, for identification, 700-A and B, and deny the motion, and receive those.

(The documents heretofore marked for identification

COMMISSION'S EXHIBITS NOS. 700-A and 700-B were received in evidence.)

Mr. Wood: I do not believe that there is any dispute, is there, that no one in National now holds any stock in Eagle-Picher? That is, Mr. Cornish's interest has been liquidated and, second, there is no allegation, is there, that National ever exercised any control over Eagle-Picher or participated in the management of Eagle-Picher?

Mr. MacIntyre: We do not agree with that entire statement. We do have some information to the effect that Mr. Cornish is dead at present, and that at the time of his
682 death National took over his beneficiary interests which, at the time of Mr. Cornish's death helped buy out Mr. Cornish.

Mr. Wood: And has been liquidated since.

Mr. MacIntyre: We don't know what the record shows on that.

Mr. Wood: But there is no contention of any control?

Mr. MacIntyre: We do contend that what Mr. Cornish held for National influenced and contributed to the control by Eagle-Picher of that part of National at that time.

Mr. Wood: That is your contention?

Mr. MacIntyre: Yes, sir.

Mr. Wood: We will meet it.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 701, which is an original telegram from The National Lead Company, Scott to W. H. Hayt of the Eagle-Picher Lead Company, under date of 12 March 1941, announcing a raise in prices in white lead-in-oil and red lead dry in Manila. That is identified on page 214 of the record.

Mr. Ewing: I object to that as it relates a price raise in Manila in the Philippine Islands.

Trial Examiner Norwood: Is there any further objection?

Mr. Wood: I think it should be connected with the case in some way. It is rather an innocuous document
683 as it stands.

Trial Examiner Norwood: I am inclined to receive anything that is part of the price picture.

Mr. MacIntyre: If Your Honor please, we would agree to the reception of that document, limited in its application to proof under count 1. We appreciate that it is not relevant to count 2 in the complaint because of price discriminations under the Clayton Act not being actionable under that Act in the Philippine Islands.

Trial Examiner Norwood: How does it fit into this picture that National wired Eagle-Picher at—where is that Temple Bar Building?

Mr. Wright: That is the home office of Eagle-Picher.

Trial Examiner Norwood: They wire from California.

Mr. Wright: That is the branch office of The National Lead Company in San Francisco.

Trial Examiner Norwood: They wire a change in price. They are competitors at this time; are they?

Mr. Wright: We allege to the contrary.

Trial Examiner Norwood: They are either competitors or one is a subsidiary of the other; isn't that a fact?

Mr. Wood: I did not quite hear Your Honor.

Trial Examiner Norwood: They are either competitors or Eagle-Picher is a subsidiary of National?

Mr. Wright: They are competitors, sir.

684 Trial Examiner Norwood: Well, I think I might well receive that as part of the picture there.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 701 was received in evidence.)

Mr. Wood: We have the illusion, at least, that we are competitors.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 703-A and B, which is an original memorandum addressed to Mr. Joseph Strannan, assistant to the manager of the New York office of Eagle-Picher Company, and signed "WFS," with an enclosure, which is a copy of a form letter from the Atlantic branch of The National Lead Company to its agents, dated July 26, 1933. It is identified at page 214 of the record, and this exhibit relates back to Commission's Exhibits 684 and 685, which are already in evidence.

Mr. Wood: Where was this identified in the record?

Mr. Wright: Page 214. That is item No. 46.

Mr. Wood: This is objected to, Your Honor, as irrelevant, in the first place, and as having no proper place in the record, because it is dated July 26, 1933, which was part of the N.R.A. period, when cooperation between companies in an industry was supposed to be much more intimate than at the present time.

I see that it adds nothing to the case.

685 Mr. Wright: Your Honor, that relates back to two exhibits, which are already in the record, and I might say that this present industry was not under an N.R.A. Code at that time.

Mr. Wood: It was working with them, though.

Trial Examiner Norwood: Are there any exhibits in the record, though, to come out?

Mr. Wright: No, sir.

Trial Examiner Norwood: There was a clause in the N.R.A. that provided that nothing therein can be construed to restrain trade in certain particulars. I am just quoting off-hand, and where it is found that an unauthorized, unjustified method of competition was employed before or after, we have always received evidence of what went on during N.R.A. Sometimes it is very valuable to show how certain methods started. The mere fact that it happened under the N.R.A. wouldn't be grounds for excluding it here, if there is anything in it that would indicate restraint of trade.

Mr. Wood: I will withdraw my objection on that ground because, as I say, it goes to the weight rather than admissibility.

Mr. MacIntyre: If Your Honor please, this is offered, and others will be offered, covering that period, not only showing what took place then, but showing that the acts as thus evidence were not within the purview of any sus-
686 pension of any anti-trust law either under N.R.A., or any code promulgated thereunder.

Mr. Wood: I am not withdrawing my objection that the document is irrelevant.

Trial Examiner Norwood: I will overrule the objection and receive 703-A and B.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 703-A and 703-B, were received in evidence.)

Mr. Wright: I offer into evidence, Your Honor, Commission's Exhibit 704, which is an original letter from W. E. Maston, who is an official of the Eagle-Picher Lead Company, to A. E. Bendelari, president of the Eagle-Picher Lead Company, under date of October 23, 1933. That is identified at page 215 of the transcript.

Mr. Wood: No objection whatsoever.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 704, was received in evidence.)

Mr. Wright: Your Honor, we offer into evidence Commission's Exhibits 705-A through D, and 706-A through F, which consists of an original handwritten letter from Wil-

lard E. Maston, the vice-president of the Eagle-Picher Company, to A. E. Bendelari, the president of the
687 Eagle-Picher Company. That is 705-A to C. 706-A to F consists of an original letter from F. M. Carter, the president of The National Lead Company, to Willard Maston, under date of September 22, 1933, together with draft of a letter to Mr. Trigg, together with a carbon copy of a memorandum prepared from Mr. Marks of National Lead to Mr. Carter, the president of National Lead. 706-A to F appears to be the enclosure referred to in 705-A to C.

Mr. MacIntyre: May we go off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: On the record.

Mr. Wood, I call your attention to line 13 of page 215 of the transcript where Commission's Exhibit 705-A through D was identified, the word "photographic." That word should be "holographic"; should it not?

Mr. Wood: I agree with your correction.

Trial Examiner Norwood: Any objection?

Mr. Wood: There is no objection.

I would like to take this clip off which seems at least to physically connect the two. There is no actual connection. This letter is dated September 22, 1933, and this one is dated Tuesday morning, and no other date.

Mr. Wright: I might point out in that connection, however, that 705 refers to 706-A through F as enclosures.

Mr. Wood: You mean this series is enclosed?

688 Mr. Wright: No. This encloses the others.

Mr. Wood: So far as I know, this is a disconnected document.

Trial Examiner Norwood: Received, as marked.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 705-A, 705-B, 705-C, 705-D, 706-A, 706-B, 706-C, 706-D, 706-E, and 706-F, were received in evidence.)

Mr. Wright: Your Honor, that offer was accepted as to all the material which was submitted there, the handwritten and the typewritten material; was it not?

Trial Examiner Norwood: That is right. Received.

Mr. Wood: There was no objection.

Mr. Wright: I now offer in evidence Commission's Exhibits 707-A through C, identified at page 216 of the record, which consists of a note to Mr. Bendelari, the president of Eagle-Picher, from E. B. Pettee, the secretary

to Mr. Roosevelt, who was a vice-president, and an intra-company memorandum to Mr. Bendelari, also signed by Mr. Pettee.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

Mr. Wood: I hope Your Honor understands when I say "no objection," I still at least have the mental reservation that it should be connected up before the case is over.

Trial Examiner Norwood: Yes, that is the under-
689 standing about all this evidence.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 707-A, 707-B, and 707-C, were received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibits 708 and 710.

710 is the carbon copy of a letter from W. H. Hayt, the general manager of the White Lead Division of Eagle-Picher Sales Company, to John L. Reque, National Lead Company, Chicago, Ill.

Commission's Exhibit 708 is an original letter from Reque to Hayt, under date of July 30, 1940, in answer to Commission's Exhibit 710.

Mr. Wood: If Your Honor please, I object to these exhibits, and I wish to make a point. These exhibits relate to mixed paint. Now, if the amended complaint, or if this case includes the mixed paint industry, the exhibit is relevant, but if it doesn't—and as I understand it, it doesn't—the exhibit is not relevant, so I object to it as irrelevant.

Mr. Wright: Your Honor, we don't contend that that letter directly concerns white lead-in-oil. However, it does show an interchange of price information between competitors in the very period which is in question here regarding a paint which both companies were at that time
690 developing and marketing out of white lead. Its principal ingredient is white lead.

Trial Examiner Norwood: It seems to me the complaint mentioned white lead products, didn't it?

Mr. Wright: The complaint charges lead pigments, but it also mentions the lead pigments as being a principal product in white lead paint, for instance.

Mr. MacIntyre: It also alleges the effects of the activities of these respondents on the prices of white lead-in-oil paint.

Trial Examiner Norwood: Go ahead with your proffer, and I will read that some more.

Mr. Wood: I want my position clear, Your Honor. I have no objection to the Commission going into the paint line, if they choose, and if they do that is relevant. I just want to know the case we have to meet, and I am taking this occasion to determine it.

Trial Examiner Norwood: Yes. I want to read this and see if its relevance is brought out.

Mr. Wright: Your Honor, I want to offer in evidence Commission's Exhibit 709, for identification, which was identified at page 217 of the transcript. It is an original memorandum, or letter, from Mr. E. B. Pettee, secretary to Mr. Roosevelt, the vice-president of Eagle-Picher Company, to Mr. A. E. Bendelari, the president of the company.

Mr. Wood: The name is "Roosevelt."

691 Mr. Wright: Roosevelt. I will accept your correction.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 709 was received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 711, which is likewise a memorandum from E. B. Pettee, secretary to Mr. Roosevelt, to Mr. A. E. Bendelari, under date of October 5, 1933, which was identified on page 217 of the record.

Mr. Wood: In view of Your Honor's previous rulings in respect of N.R.A. matters, I am not objecting to this, but it is an N.R.A. document.

Trial Examiner Norwood: Well, counsel may have the benefit of an objection there.

Mr. Wright: I don't agree that it is an N.R.A. document, Your Honor.

Trial Examiner Norwood: Received as marked.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 711, was received in evidence.)

Mr. Wright: I offer in evidence Commission's Exhibit 712-A through E, which was identified in the record

692 at pages 217 and 218, which is an original letter from Mr. Willard E. Maston to Mr. A. E. Bendelari, presi-

dent of the Eagle-Picher Company, under date of September 14, 1933, and enclosures.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 712-A, 712-B, 712-C, 712-D, and 712-E, were received in evidence.)

Trial Examiner Norwood: The ruling on this 708 and 710—I think it ist very clear that the complaint does allege a general plan here, a general plan to restrain trade, and so forth, just the same as if someone was indicted for something and where there was a general scheme and something outside of the complaint was brought in to show the general plan. I think it is good law to receive testimony like that under those circumstances.

I will overrule the objection and receive the Commission's Exhibits 708 and 710.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 708 and 710 were received in evidence.)

Mr. MacIntyre: May we go off the record before we start with this witness?

Trial Examiner Norwood: Off the record.

693 (Discussion off the record.)

Trial Examiner Norwood: Go ahead with your witness.

JAMES S. KELAHER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name and occupation?

A. My name is James S. Kelaher. I have been employed as an investigator for the Federal Trade Commission since 1935, as an accountant, and as an attorney.

Q. Have you had an occasion to make an investigation of the records of the Eagle-Picher Lead Company and the Eagle-Picher Sales Company?

A. Yes, in June and July of 1945 I made such an examination.

Q. Will you state briefly for the record with whom you

talked at the Eagle-Picher Company and how you made your investigation?

A. When I arrived at the Eagle-Picher offices—White Lead Division offices, at 1030 Broadway, in Cincinnati, I conferred with Mr. W. H. Hayt, the general manager and vice-president of the Eagle-Picher Sales Company, and I presented him with a list of cities, delivery points in various sections of the United States, and asked him
694 to select the names of at least two customers in each class in each of those cities showing customers; that is, during the period from January 1, 1941, to November 25, 1944.

He then—he was unable to give me the customers in each of the towns, but in those towns in which he did have customers he presented me with such a list, and we then proceeded to the file room and pulled the invoices for those particular customers, and I worked from those invoices, and these are the results of the—that is, on the information, from 1941 to 1944.

Q. Were the invoices and records that you examined all there in the offices of the Eagle-Picher Company, or was it necessary for them to pull any records from other sources?

A. They were all there in the offices of the Eagle-Picher Company, White Lead Division.

Q. I show you an exhibit marked Commission's Exhibit, for identification 754-A through U, and ask you to describe what it is.

A. Well, this first group here consists of price and freight data on sales of white lead to selected distributors in selected towns and cities during the period January 1, 1941, to November 25, 1944. In order to clarify the tabulations, I segregated them into groups, and this first group consists of sales to distributors only.

Q. What page are you speaking of, 754-B?

695 A. I am speaking all the way through to 754-U.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

The Witness: This tabulation here shows sales or billings to customers, for example, on sheet 754-B; in the first column it gives the customer and the address. In the second column it will show the class and zone. By "class" that refers to the class of customer. These, as I said be-

fore, are all distributor customers in this particular group.

In the next column we have the invoice number, and in the one next to that the invoice date.

Q. Is that the invoice number which appeared on the record of the Eagle-Picher Company from which you secured the information?

A. That is right. Then in the next column we have a heading "100 Pound Kegs Only." In order to facilitate the study we confined it to a tabulation of sales of 100 pound kegs only, because that is the base keg for the industry.

In this column here we have the pounds which appeared on that particular statement in the record, and the price. This is the price paid by the customer named in the first column to the Eagle-Picher Sales Company, and then
696 in the next column we have the total pounds of white lead billed. This appeared on the invoice, and we used that in order to arrive at a total amount of freight. It was necessary for freight purposes.

Q. In that connection, I call your attention to the first line of sheet 754-B. On that invoice you have entered 100 pounds of white lead in hundred pound kegs.

A. That is correct.

Q. And in the column "Total Pounds White Lead Billed," there is 262½. Will you explain that difference?

A. The difference of 162½ pounds will consist of sales and other types, and sizes, rather, of containers or 12½ or 50-pound kegs, or 150-pound cans.

Then in the next column we have a description of the product. In this case it is white lead-in-oil. In the next column we have the origin of the shipment that was shipped from Cincinnati, and the destination, showing the point of delivery was Miami, Fla., in this particular instance.

In the next column we have the method of transportation. In this case it was by rail. The method of transportation was inserted, and, I might add, going back to the origin, the origin was included by an official of the Eagle-Picher Sales Company, Mr.—an employee of the Eagle-Picher Sales Company, Mr. W. F. Kelly.

Q. Are those initials, "WFK" at the bottom of
697 the column headed "Origin"?

A. That is correct.

Q. And they are also at the bottom of the column headed, "Via Rail or Truck"?

A. That is correct.

Q. And at the bottom of the column headed "Gross Weight of White Lead"?

A. That is right.

Q. What is the significance of those figures of gross weight of white lead?

A. In order to determine the amount of freight paid on that particular billing, it was necessary to include the gross weight; that is, the net weight of the white lead plus the weight of the container.

Then in the next column we have inserted by Mr. H. W. Dunbar, whose initials are "HWD," inserted at the bottom of the page, who was traffic manager of the Eagle-Picher Lead Company, and whose initials appear at the bottom of each page, together with the date on which he included this freight rate information. The rate was inserted by Mr. Dunbar and it was extended under Mr. Kelly's direction to the final column on the righthand side under "Amount," and that is initialed by Mr. Kelly.

Q. So, as I understand it, then, your work was checked by these employees, Mr. Kelly and Mr. Dunbar?

698 A. That is correct.

Q. And the figures were either checked by them or were supplied by them directly?

A. That is right. They worked with me in fullest cooperation, I might add, at all times, and were fully advised of the work I was doing there, and they received photostatic copies, in number about six or seven, before I left Cincinnati, of these statements.

Q. Now, does that explanation of the method of compiling and the significance of the figures on sheet 754-B also apply to sheets 754-C through U?

A. That is right. I might add there that these are records of the White Lead Division, which are concerned primarily with sales of white lead-in-oil, and they have sales of dry white lead, incidentally, and there are some sales of dry white lead in here.

Q. Now, I call your attention to note here on page 754-B, "Distributors were billed for shipments from consigned stocks during month, under unlimited consignment contract in effect during 1941, 1942, and 1943, on in-oil-white lead. Dry white lead is not sold on consignment, but is sold direct." In other words, at any time dry white lead appears in here that was a direct sale and shipment rather than a billing on consignment?

A. That is right.

699 Q. I call your attention to the sheets marked Commission's Exhibits 754-V through Z-10, for identification, and ask you to describe that.

A. These are sales of white lead to paint manufacturers during the period January 1, 1941, to November 25, 1944.

Q. The information was secured in the same way?

A. The information was secured in the same way, but I would like to call attention to the fact that these were records obtained from the Pigment Division, which sells dry white lead only, and does not handle white lead-in-oil.

Q. Does that Pigment Division handle altogether dry white lead, or do they handle other lead pigments as well?

A. I am sorry. Just as distinguished between dry white lead and white lead in oil, they handle dry white lead. They do handle other products.

Q. Would you describe this sheet 754-W?

A. This set-up is similar, substantially, as those that I described before. I will be glad to go into detail, but it is almost the identical set-up with the exception that we are concerned here with dry white lead primarily, and they are actual sales to paint manufacturers. Each of these invoices represents a shipment to a paint manufacturer.

Q. Each is a single shipment?

A. Each is a single shipment; that is correct.

Q. I note the words "on contract" on sheet 754-W.

700 What is the significance of that?

A. During that period, as I understand it, paint manufacturers were able to buy dry white lead on contract, and their purchases were applied against that particular contract over a period of time.

For instance, they may enter into a 20-ton contract, which would be shipped over a period of weeks or months.

Q. And the initials "WFK" and "HWD," which appear on the sheets 754-V through Z-10 are the same employees of Eagle-Picher that initialed the sheets in 754-A through U?

A. That is right.

Q. I call your attention to sheets marked Commission's Exhibits 754-Z-11 through Z-20, for identification, and ask you to describe them.

A. This consists of price and freight data on sales of

white lead to selected customers of various classes by the Pigment Division during the period January 1, 1941, to November 25, 1944. This includes a miscellaneous group of customers, and for our purposes they were all placed together here. It includes sales to industrial customers of various types, sales to painters, etc.

Q. In your second column from the left under "Class," for instance, on 754-Z-12, the first line, there is "Pottery Ceramics," the second one, "Enemeling Ceramics." Were those classifications supplied by the records of the

701 Eagle-Picher Company?

A. They appeared on the invoice under a code number, and the code symbols were given to me by the officials of the company, and I inserted them here.

Trial Examiner Norwood: Those were all consumers, weren't they, on that page?

The Witness: These may include some painters. They may include industrial accounts. It is just a miscellaneous group of customers, some of whom bought at consumer prices.

Trial Examiner Norwood: None of it was for resale; was it?

Mr. Wright: I don't believe, Your Honor, it appears in several of these things whether it was for resale or not, except for the general classification of the customer.

The Witness: That is right. For the most part, I will say that was not for resale in this particular group.

By Mr. Wright:

Q. The initials "WFK" and "HWD" again on these sheets are the initials of the employees of the Eagle-Picher Company who either checked your information or inserted it, themselves?

A. That is right.

I would like to state here in order to get quick freight information, Mr. Dunbar, together with Mr. Kelly, inserted, as I said before, the origin of the shipment, and also the mode of transportation. For instance, you

702 might have a shipment going by rail and truck. Where that was done separate rates were put in for rail and for truck shipments in order to arrive at the total freight.

Q. I call your attention to the sheets marked 754-Z-21 to Z-33, and ask you to describe what those sheets are.

A. These sheets are similar to those described immediately preceding, but represent sales to selected customers

by the White Lead Division during the period January 1, 1941, to November 25, 1944, that is, the White Lead Division as distinguished from the Pigment Division.

Q. I call your attention now on sheet 754-Z-22 to the column marked "Freight Rates" here, which were entered, you say, by Mr.—

A. Dunbar.

Q. —H. W. Dunbar.

A. Except where they appeared on the invoice.

Q. Do you know where he obtained that freight information?

A. Yes. Mr. Dunbar checked his records very thoroughly, and he supplied freight rates which reflected the general freight policy of the company as of the invoice date. In some instances, the actual freight allowed the customer appeared on the invoice, and in those cases it was tabulated directly on this tabulation.

Q. And you have no way of knowing which ones actually appeared on the invoices and which ones were actually
703- secured from the records by Mr. Dunbar?

704 A. Yes; I can tell by the handwriting, my handwriting. There is one right here. I can check it through.

Mr. Wright: Off the record here.

(Discussion off the record.)

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 754-Z-34 to 52, and ask you to state what that is.

A. These are—reflect price and freight date on sales of white lead to customers of various classes during the period January 1, 1933, to March 31, 1934. These were obtained in a somewhat differenct manner than those for the 1941 to 1944 period, due to the fact that the sales records of the company were not available showing sales to customers during that period. It was necessary to examine the invoices directly, most of the invoices of the company, in order to get that information for that period.

Q. I call your attention to the sheet stapled to the top of page 754-Z-34, and ask you to state what that is.

A. That is a statement by Mr. H. W. Dunbar, traffic manager, describing the manner in which he inserted the freight rates on these tabulations.

Q. The initials which appear at the bottoms of the columns in here, "WFK" and "HWD" are the same em-

ployees of the Eagle-Picher Company who either in-
705 serted that information or checked here?

A. That is right.

Q. I call your attention to Commission's Exhibit 754-Z-53 through 60, and ask you to state what that is.

A. These are sales of dry white lead to selected customers of various classes during the period January 1, 1933, to March 31, 1934.

Q. That was made up in the same manner from the same type of records, and shows the same information?

A. That is correct.

Mr. Wright: I have no further questions of the witness. Just a moment. I would like to ask just one more question.

By Mr. Wright:

Q. Are we correct in our understanding that it is your testimony that all of the information appearing on Commission's Exhibits 754-A through 754-Z-60, inclusive, is a statement of information appearing on the records of the Eagle-Picher Company, and is supplemented by statements of the officials of that company?

A. That is correct.

Mr. Wright: No further questions.

Trial Examiner Norwood: Do you offer this?

Mr. Wright: Yes. I wish to offer at this time
706 Commission's Exhibit 754-A through Z-60 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wood: Could we have a short recess before taking up the cross-examination?

Trial Examiner Norwood: We will have a 10-minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Come to order, gentlemen.

Mr. Wood: On these exhibits that you have produced, there is a column which at the top of the page is headed "Freight."

The Witness: Yes, sir.

Mr. Wood: Where did you get the figures that are filled in in that column?

The Witness: They were supplied by Mr. H. W. Dunbar, traffic manager for Eagle-Picher Lead Company, who initialed each statement and the date on which he inserted the figure, except in those instances where the rate appeared on the invoices, which case I tabulated it myself.

Mr. Wood: How can you tell those cases in which it appeared on the invoice?

The Witness: I can tell by my handwriting.

Mr. Wood: Can you give us an example? I am just trying to find out.

The Witness: Yes. I gave one example there when
708 I was going through.

Mr. Wood: I was not looking over your shoulder. I want to get the key to the interpretation of this.

The Witness: There are three appearing right here. You will notice the difference in handwriting. This is my handwriting.

Mr. Wood: You are referring to sheet 754-X. Is that right?

The Witness: That is correct. And invoices PD-7883, PD-6868, and PD-9169 covering shipments of dry white lead to Perry Paint & Glass Company, Washington and Brush Streets, Tampa, Fla., the amount of the freight appeared on the invoice, presumably being collect shipment with freight allowed.

Mr. Wood: The collect shipment with freight allowed presumably. I don't quite understand what you mean.

The Witness: By that I mean that if the buyer pays the freight under any delivered price system, he would be allowed the freight on the invoice as a deduction from the gross amount of the bill.

Mr. Wood: Is that your interpretation of it, or was that the fact of the transaction?

The Witness: That, of course, is my interpretation, but it would be the only instance where they would show freight on an invoice, according to officials of the company.

Trial Examiner Norwood: Does the invoice indi-
708 cate any freight would be allowed?

The Witness: It did indicate freight allowed.

Mr. Wood: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wood: I wonder if it would be possible for you, overnight, to go through these documents and make a list of all invoice numbers on which there was freight on the invoice; that is, that you filled out from the invoice, instead of getting the information from Mr. Dunbar?

The Witness: Yes, sir.

Mr. Wood: Is that all right with you, Mr. Wright?

Mr. Wright: I have no objection to it if he is willing to do it.

Mr. Wood: Now, on the other entries, not of the class to which you have just referred, you say Mr. Dunbar gave you the freight rate to the place?

The Witness: He inserted the freight rate to the place in his own handwriting.

Mr. Wood: Do you know whether or not the amount he inserted was the amount of the actual freight on that shipment, or was it the theoretical freight rate?

The Witness: It was not theorefical. It was the actual freight rate in effect as of the date of that invoice. It was not theoretical.

709 Mr. Wood: Was it the freight actually paid on that shipment?

The Witness: It was not taken from a freight bill for that particular shipment. It reflected the general freight rate policy of the company in effect as of the date of the invoice.

Mr. Wood: What freight rates did he fill in? Were they carload shipments, less-than-carload shipments, or what?

The Witness: If it was a carload shipment, he filled in the carload rate; if it was a truckload shipment he filled in the truckload rate; if it was less-than-carload, he filled in that rate; if it went partly by boat and partly by truck, he filled in the boat rate for the particular period covered, and the remainder of the distance was covered by the truck rate.

Trial Examiner Norwood: I think we had better dispose of objections, first, and then counsel may cross-examine on all those points.

Mr. Wood: I will not make any objection to the introduction of this exhibit in view of the fact that The National Lead exhibit was permitted to go in, but I do not acquiesce that this exhibit discloses anything contended for by the Trial Attorney for the Commission.

Trial Examiner Norwood: Counsel may cross-examine him.

710 I will receive Commission's Exhibit, for identification, 754A to Z-60.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 754-A, 754-B, 754-C, 754-D, 754-E, 754-F, 754-G, 754-H, 754-I, 754-J, 754-K, 754-L,

754-M, 754-N, 754-O, 754-P, 754-Q, 754-R, 754-S, 754-T, 754-U, 754-V, 754-X, 754-X, 754-Y, 754-Z, 754-Z-1, 754-Z-2, 754-Z-3, 754-Z-4, 754-Z-5, 754-Z-6, 754-Z-7, 754-Z-8, 754-Z-9, 754-Z-10, 754-Z-11, 754-Z-12, 754-Z-13, 754-Z-14, 754-Z-15, 754-Z-16, 754-Z-17, 754-Z-18, 754-Z-19, 754-Z-20, 754-Z-21, 754-Z-22, 754-Z-23, 754-Z-24, 754-Z-25, 754-Z-26, 754-Z-27, 754-Z-28, 754-Z-29, 754-Z-30, 754-Z-31, 754-Z-32, 754-Z-33, 754-Z-34, 754-Z-35, 754-Z-36, 754-Z-37, 754-Z-38, 754-Z-39, 754-Z-40, 754-Z-41, 754-Z-42, 754-Z-43, 754-Z-44, 754-Z-45, 754-Z-46, 754-Z-47, 754-Z-48, 754-Z-49, 754-Z-50, 754-Z-51, 754-Z-52, 754-Z-53, 754-Z-54, 754-Z-55, 754-Z-56, 754-Z-57, 754-Z-58, 754-Z-59, and 754-Z-60, were received in evidence.)

Trial Examiner Norwood: Now, if Mr. Wright wants to ask him any further questions, he may do so.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Now, you may cross-examine the witness.

711. *Cross-Examination by Mr. Wood.*

Q. Do you know whether or not Mr. Dunbar looked up the actual freight paid on each one of those shipments?

A. Which shipments are you referring to?

Q. Any of them that are noted on the exhibit.

A. In that connection, I think I would like to clarify that a little. The so-called shipments you mention on the first group of exhibits, 754-A to U, are billings as stated in the footnote, for shipments from consigned stock during the month, so that the invoice here—the applicable freight rate would have to be determined by the freight rate in effect as of the date of that invoice.

In other words, this is a billing showing the actual price paid by the customer, the distributor-customer, to Eagle-Picher Sales Company. There would be no freight rate billed on that invoice.

Do I make myself clear?

Q. Yes. But my question is whether or not Mr. Dunbar filled in the theoretical freight rate from Cincinnati to the destination, or whether he filled in the exact rate which the company paid on that specific order.

Mr. Wright: Your Honor, I think if counsel would explain his use of the word "theoretical," we would get further in this examination.

712 Mr. MacIntyre: Your Honor, I have a further objection, and that is this: The question I put to this

witness is whether or not the rate Mr. Dunbar gave to this witness, and filled in, is correct or not correct. The witness has not yet been qualified as a freight rate expert, nor, for that matter, has any foundation been laid to show that he knows what the rates were.

Trial Examiner Norwood: He knew what he wrote in.

Mr. MacIntyre: But whether or not Mr. Dunbar knew those were the correct rates—

Trial Examiner Norwood: I don't think that is the question.

Read the question, please.

(The Reporter read the last question.)

Trial Examiner Norwood: Objection overruled.

The Witness: He filled in what he felt very reasonably sure was the exact amount of freight paid by the company on that order.

By Mr. Wood:

Q. Referring to 754-B, the first entry there is a shipment to Gentry Brothers, Miami, Fla.

I am just taking this as an illustration. That was 26½ pounds, and the freight rate there is given as $1.48?

A. That is correct.

Q. And the total amount is given as $4.08. You, 713 yourself, know whether that 262½-pound shipment went as an entity, itself, or was it a part of a larger shipment?

A. I think I should, if I may, answer your question, as I answered the last. I would like to make a distinction here. It is almost impossible to answer your question without the distinction.

These are billings for shipments from consigned stock during the month. You take this particular billing. It is dated January 31, 1941. This amount represents shipments from stock consigned to Gentry Brothers, Inc., for which they were billed at the price of $10.125 per hundredweight for 100-pound kegs.

That 262½ pounds wash shipped from merchandise on hand at Gentry Brothers, which was shipped to them prior to this date of January 31, 1941.

So in order to clarify it, I would like to say that it would be absolutely impossible to get an actual freight rate for this actual shipment because it is a billing from consigned stock.

I hope I have made that distinction clear.

Q. You mean that if you or I tried to send 262½ pounds of white lead in 100-pound kegs, or whatever they were, from Cincinnati to Miami, Fla., the railroad would charge us $4.08. Is that right?

A. As of January 31, 1941.

714 Q. But we wouldn't pay that if it were part of another shipment, part of a carload shipment, for instance?

A. That was taken into consideration in arriving at these rates.

We knew from available records whether or not the shipments were in carloads or less-than-carloads. This rate here apparently would be—this is a rail shipment, and would probably bear a carload rate.

Q. Do you know whether or not it was a carload rate?

A. No, I don't. You would have to ask Mr. Dunbar.

Q. The point I am trying to make is this: In how many instances in this document can you testify to your own knowledge that the amount appearing in the last column, the heading of which is "Amount" under "Freight"—in how many instances can you testify that that is the figure Eagle-Picher actually paid on that specific shipment?

A. Just on those on which the freight rate appeared on the invoices.

Q. How long did you spend in Cincinnati in compiling your data of your exhibit?

A. I have the sheets dated. The first day is June 5th.

Q. June 5, 1945?

A. June 5, 1945, to July 11, 1945, approximately.

Q. You spent that time in Cincinnati?

A. At the offices of the Eagle-Picher Lead Com-
715 pany, 1030 Broadway.

Q. Did you have any assistants with you from the Commission?

A. No, sir.

Q. Did anyone in the Eagle-Picher organization work with you?

A. They worked in cooperation with me.

Q. How many men in the Eagle-Picher organization worked with you?

A. Mr. Hayt, Mr. Hugh Connelly and Mr. Kelly, and they supplied some typed statements for me which were done by the clerical help.

Q. How about Mr. Dunbar?

A. Mr. Dunbar, too; I am sorry.

Q. Can you give me a rough estimate of how much time the personnel of the Eagle-Picher organization spent with you?

A. I would hesitate to say.

Q. You took up a good deal of time?

A. I am afraid that isn't correct—I wouldn't say a good deal.

Q. They did cooperate in all respects?

A. Very fully, and I tried to be as unostentatious as possible.

Q. What is your understanding of Mr. Dunbar's duties with the company?

A. It was my understanding he was their recognized expert on freight rates, according to a statement made
716 by other officials of the Company.

Q. What is an expert on freight rates?

A. One who is versed in the rates of freight on shipments of various types. In his case, it would be lead pigment, no doubt.

Q. Why is there any purpose in a freight rate expert?

Mr. MacIntyre: I did not hear that question.

Mr. Wood: I asked why there is any purpose in a freight rate expert.

Mr. Wright: I object to that. Where is this cross-examination leading?

Trial Examiner Norwood: I don't see that that is in the range of his expertness.

Mr. Wood: He testified he received certain information from Mr. Dunbar, and he relied on that information.

I will withdraw that question and try to cover the subject very quickly in a slightly different form.

By Mr. Wood:

Q. Isn't it a fact that figuring freight rates is a very difficult job?

A. I understand so.

Q. And Mr. Dunbar makes a specialty of it for the Eagle-Picher Company and, to obtain this information which you desired, you had to go to an expert. Is that correct?

A. That is my understanding.

717 Q. In picking these various accounts that you have listed there, did you take into consideration whether or not any of them were in competition with one another?

Mr. MacIntyre: I object to that question. The testimony of this witness is to the effect that officials of the Eagle-Picher Company selected and submitted to him the names of at least two accounts in each class for each of the cities he specified, wherever they had them.

There is no testimony in the record that this witness selected those two accounts in each case in each of the cities where Eagle-Picher has offices.

In the light of that, may we have the question read?

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think he can tell us his considerations in making out these tabulations here.

Mr. MacIntyre: The question presupposes that he selected the accounts.

Trial Examiner Norwood: He didn't presuppose anything. He said, "Did you take into account this competitive situation in making the tabulations?"

Mr. MacIntyre: In selecting the accounts. He didn't select the accounts.

Trial Examiner Norwood: I overrule the objection. Answer the question.

718 The Witness: I would like to state the officials of Eagle-Picher did select the customers, with minor exceptions. In going through the file I may have selected a few, but the list for 1941 to 1944 was selected by officials of the company.

By Mr. Wood:

Q. How about 1933?

A. I attempted to select customers there, but due to the length of time that had passed it was necessary to examine a number of invoices to obtain the number desired.

Q. To the extent you had discretion in selecting the accounts, did you take into account whether or not the customers were competitors?

Trial Examiner Norwood: Did you select the accounts at all?

The Witness: I selected a few.

Trial Examiner Norwood: Answer his question.

The Witness: I would say that did not enter my mind at the time, because I had no way of checking or knowing if they were in competition with one another.

If they were in the same town, they might be competi-

tive, but that would be the least of my considerations at that time.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

719 Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 4:15 p. m., the hearing was adjourned until Wednesday, June 19, 1946, at 10 o'clock a. m.)

Room 332, Federal Trade Commission Building, Washington, D. C., June 19, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., apearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), and T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), and Richard Serviss, Esq. (1100 American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

722 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to the adjournment on yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., on the 19th day of June, 1946.

Please enter the appearances.

JAMES S. KELAHER, resumed the witness stand, and was examined and testified as follows:

Cross-Examination (Resumed).

Mr. Wood: Mr. Kelaher—excuse me, Your Honor.

Trial Examiner Norwood: Mr. Kelaher is recalled to the stand for further cross-examination.

Proceed, Mr. Wood.

By Mr. Wood:

Q. Mr. Kelaher, I asked you yesterday afternoon to make a list of the entries in your exhibit which you produced, a list of those where the freight appeared on the invoice. Have you done so?

A. Yes, sir.

Q. Can you produce that, please?

A. I have gone through here, and with a red mark 723 checked every entry I made, personally.

Mr. Wood: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wood: On the record.

Counsel for the Commission is preparing a list of the invoice numbers that the witness has checked with a red mark as entries made in his handwriting which he entered freight from the invoices.

Is that a correct statement?

Mr. MacIntyre: Yes.

The Witness: That is correct.

Mr. MacIntyre: I would like, though, that the witness' testimony be made a matter of record probably a little more clearly than it is as it stands at present, showing

that he has made red check marks opposite the amounts of freight in each instance where he found it on the invoices. I am not sure that that has been developed.

Mr. Wood: That is my understanding of it.

By Mr. Wood:

Q. Would you reply to Mr. MacIntyre's statement as if it were a question from me?

A. I would say that Mr. MacIntyre was correct in his statement.

Q. Now, as I understand it, in those entries where
724 there are no red checks there was no freight on the invoice; is that correct?

A. That is correct.

Q. Now, why, where there was no freight on the invoice, did you enter freight on your exhibit?

A. I did not enter freight where there was no freight on the invoice.

Q. Who did enter it? It was done under your direction?

A. It was not done under my direction.

Q. How did it get there? Who asked for it?

A. It was placed there by—I asked for it, but the figures were inserted by the company.

Q. Now, what was your purpose in asking for it?

A. Why, principally, to insure the fairness and accuracy of the statements.

Mr. Wood: I haven't made myself quite clear.

Mr. Wright: Your Honor, I object to the question as to his purpose in asking for it.

Trial Examiner Norwood: You object to this last question asked?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Read the question.

(The Reporter read the last question.)

Trial Examiner Norwood: Objection overruled.

The Witness: I believe I answered.

725 (The Reporter read the last answer.)

By Mr. Wood:

Q. I haven't made myself clear there.

The freight entries on the exhibit were not taken from invoices, but were figures supplied to you by Mr. Dunbar, the traffic manager of Eagle-Picher. Now, why did you ask him for the information to constitute that entry in respect to each invoice where there was no such notation in the company's books?

A. Well, that was in order to determine the amount of freight applicable to that particular billing or shipment.

Q. And what was the purpose in making that theoretical determination of the freight applicable?

Mr. MacIntyre: I object. The record shows that it was not theoretical but actual, as it was developed yesterday afternoon; and, furthermore, as to why it is necessary to the case to develop it, the freight rate information, isn't something for this witness to testify, even if he should know it.

Trial Examiner Norwood: I think that he may show why he made these entries, if he knows why, either carrying out some instruction there which he is applying, himself, or which he is conforming to literally. He can show all about that. He made this. He can tell us all about it.

Mr. MacIntyre: I have no objection to that. We are talking now about, under the question that is pending, 726 as to why freight rate information is necessary to this case. This man didn't develop that freight information. He merely asked for it, and an official of the company inserted it on these sheets.

Trial Examiner Norwood: He is asking why it is necessary to the picture here which he has made of this case, how it fits in the picture. That is the way I understand the question.

Objection overruled.

The Witness: Well, my answer to that would be that I was carrying out my instructions.

By Mr. Wood:

Q. You were carrying out your instructions?

A. To get freight rate information.

Q. And you knew no purpose behind the instructions?

A. At that time I was—that was my first contact with the case. I did not know—had not studied the case. I was sent out in a hurry, and I think that is the best answer I can give.

Q. You were a lawyer?

A. Yes, sir.

Q. And an investigator for the Federal Trade Commission?

A. Yes, sir.

Q. And how long have you been an investigator for the Federal Trade Commission?

727 A. Since 1935.

Q. And I think you testified you spent approximately six weeks in Cincinnati?

A. That is correct.

Q. And three or more of the members of the Eagle-Picher organization cooperated with you in compiling this exhibit; is that correct?

A. That is correct.

Q. And you had the run of the plant, and examined a great many different invoices, a great many more than you used for your notations; didn't you?

A. I think that is incorrect; the latter part of the statement.

Q. What is correct?

A. I did not examine for the 1941-1944 information a great deal more invoices than I used.

Q. But you had access to all invoices; didn't you?

A. Yes; they were there if I wanted to look at them.

Q. Now, you testified yesterday that there were instances in which you used and exercised discretion in the selection of invoices. I believe; didn't you?

A. I was referring then, as I pointed out, to the time principally, to the 1933-1934 information when I had to use discretion because of a lack of sales records.

728 Q. Now, in utilizing your discretion in the selection of material, what inference were you attempting to establish?

Mr. MacIntyre: I object. It is not shown that this witness was attempting to establish any inference.

Trial Examiner Norwood: I think that he is assuming something there.

Mr. Wood: Well, I will not pursue the line of examination, but I do want this clear: I was very much taken by surprise yesterday when Mr. MacIntyre told us off of the record—

Trial Examiner Norwood: Wait a minute. Off the record is privileged absolutely.

Mr. Wood: Is what?

Trial Examiner Norwood: Is privileged. Off-the-record statements are privileged. We go off the record to see if we cannot come to agreement, and counsel are not committed by their statements in making propositions to compromise.

Mr. Wood: Then may I go off the record a minute, now?

Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Trial Examiner Norwood: Go ahead.

By Mr. Wood:

Q. Now, what were your instructions regarding the making of freight rate notations on your exhibit?

729 A. As I recall, I was instructed to obtain the information directly where possible from the invoices. Otherwise, to ask the assistance of the company in presenting them to us.

Q. Now, did you ask for any particular type of freight rate or just the freight rate rail or truck, or—

A. Why, we have it broken down, as you will notice by looking here, in sheets. All shipments are designated as to whether or not they went by rail, by truck, by boat, or by combination of any or all of those methods of transportation, and the freight rates were applied accordingly.

Q. As to what those would have been?

A. As to what they were.

Q. Well, you mean the prevailing rate that was set down in your column?

A. That is correct.

Mr. Wood: I think I have just one or two more questions.

Trial Examiner Norwood: Go ahead.

By Mr. Wood:

Q. Now, it would have been possible for you to obtain the prevailing freight rates between various points from sources other than Mr. Dunbar; would it not?

Mr. MacIntyre: May we have the question read?

Trial Examiner Norwood: Read it.

(The Reporter read the last question.)

730 Mr. MacIntyre: I object to the question.

Trial Examiner Norwood: Overruled.

Mr. MacIntyre: It is not relevant and material to the issues as to what he could have done there. We are talking about what he did do.

Trial Examiner Norwood: He is cross-examining on this thing here. I think he may ask him that.

Go ahead.

The Witness: In answer to that, all I can say is that I do not know what I could have done because I didn't try.

By Mr. Wood:

Q. Have you ever attempted to determine freight rates?

A. I have not.

Q. But you know that it could be determined some way or other as a matter of public information; don't you?

A. I will stay on my first answer.

Q. Is there any reason that you could not have filled in the theoretical or prevailing or hypothetical freight rates between two points from sources of public information rather than Mr. Dunbar?

A. I have no way of knowing. I am sorry.

Mr. Wood: That is all.

Mr. Wright: I would like to ask just a few questions here.

731 *Redirect Examination by Mr. Wright.*

Q. You stated in answer to a question on cross-examination that the prevailing rate is set down. Was it not the rate, so far as could be determined, that was actually used by the company that was set down?

A. That is correct.

Mr. Wood: That is a leading question.

Trial Examiner Norwood: I think it is, yes. Objection sustained.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Will you please state what you meant by the use of the word "prevailing" in answer to that question?

A. Well, I would like to make myself perfectly clear on that point.

They were the rates which the company actually paid on those particular shipments, or which applied to those particular billings in so far as the company could determine.

Q. Now, in connection with the rates which were inserted in the sheets by Mr. Dunbar, in some instances they show a carload freight rate, in other instances they show a less-than-carload freight rate. Who made the distinction there?

A. Mr. Dunbar is responsible for every freight rate he put in there.

732 Q. What was the basis for his distinction, if you know it?

A. Why, that would be determined by the particular shipment in those cases where he had the available information.

Q. How is that answer limited to those entries which show a single sale and shipment, or does that apply also to the sheets which refer to the billings and consignment?

A. I think he would take that under consideration, and did take it under consideration in establishing his freight rates on all the sheets here.

Mr. Wright: I have no further questions.

Mr. Wood: I have just one or two more that have developed from that.

Recross-Examination by Mr. Wood.

Q. Do you know what Mr. Dunbar's mental processes were?

A. I do not.

Q. What were the instructions which you gave him, if any?

A. I asked him to insert the applicable freight rates to the invoices which I had previously transcribed onto these statements, and he was referred to as the most competent man in their organization who could give that information, and I relied, of course, upon his judgment in the matter.

Mr. Wood: That is all.

Mr. Wright: No further questions.

Trial Examiner Norwood: The witness is discharged.

733 (Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. MacIntyre: If Your Honor please, I would like to proceed by offering some additional exhibits for the record.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: These exhibits have to do with the respondent Glidden, and its manufacture, sale, and distribution of lead pigments.

I offer into the record a document heretofore marked for identification as Commission's Exhibit 593, and identified at page 285 of the transcript, and as a statement by respondent Glidden of premium zones and price differentials applicable thereto, under date of October 10, 1941.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: On the record.

No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 593, was received in evidence.)

Mr. MacIntyre: I now offer into the record a document heretofore marked for identification as Com-
734 mission's Exhibit 649-A, B, and C, heretofore identified at record page 286, and as a statement by respondent Glidden concerning its consignment proposition on lead pigments under date of July 17, 1939.

Mr. Hinds: Without adopting counsel's characterization, and disagreeing sharply with it as not being in accordance with the facts, I have no objection to the admission of the exhibit.

Trial Examiner Norwood: The exhibit is received as marked, and not necessarily as described by counsel.

Mr. Hinds: It will speak for itself, I assume.

Trial Examiner Norwood: Yes.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 649-A, 649-B, and 649-C was received in evidence.)

Mr. MacIntyre: I offer into the record Commission's Exhibit 650-A through C, heretofore identified at record page 286. This is offered as the original of an agreement between the respondent Glidden—as the original of a contract between respondent Glidden and one of its purported agents in St. Louis, Mo., under date of May 27, 1941.

Mr. Hinds: Does counsel, by using the word "purported" imply that this other party to the agreement was not in effect an agent, or was not exactly as stated to be? Is that a contention that the Commission makes, or—

735 Mr. MacIntyre: We state that this contract was entered into with a provision set forth therein. As to the intentions of the parties, I contend that we will have to look to the entire record regarding those.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Now, complete your statement, Mr. Hinds.

Mr. Hinds: We have no objection to that exhibit. Again, we do not adopt the characterization.

Trial Examiner Norwood: Well, that will be understood hereafter that the documents are received for what they show and what they have been identified to be by the witnesses.

Mr. Wright: Your Honor, in that connection I would like to call attention of counsel for Glidden Company to the fact that this particular document, Commission's Exhibit 650, was erroneously identified on page 286 of the transcript as Commission's Exhibit 658.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: It should have there been listed on line 1 of that page as 650 instead of 658. I think counsel will agree to that.

Mr. Hinds: Well, I have to take your word for
736 that because I haven't got it with me. That is all right. I don't question it. It will appear on the record.

Trial Examiner Norwood: Well, as presented now, it is Commission's Exhibit 650?

Mr. MacIntyre: Yes, sir.

Trial Examiner Norwood: What are the extra pages?

Mr. MacIntyre: 286, line 1.

Trial Examiner Norwood: No, I mean the extra pages there, 650-A to what?

Mr. MacIntyre: A to C.

Trial Examiner Norwood: It is received in evidence.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 650-A, 650-B, and 650-C, was received in evidence.)

Mr. MacIntyre: Now, if Your Honor please, in connection with the ruling, I have raised no objection to the ruling that it is not necessarily received as described by me.

Trial Examiner Norwood: That is right.

Mr. MacIntyre: But if it is not to be received as a contract between the parties that I have mentioned, and as it purports to be, we would, of course, like to know it. We don't want it just received as a paper. We want it received as evidence of a contract between those parties.

Trial Examiner Norwood: Your calling it a contract
737 doesn't make it a contract. Now, you cannot add to or subtract in any way whatsoever from the value of that exhibit.

Mr. MacIntyre: We don't want to.

Trial Examiner Norwood: You may describe it in any way you wish.

Mr. Hinds: To—

Trial Examiner Norwood: And you may offer it as so and so.

Suppose you say "I offer this as conclusive evidence of this, that, or the other." When I receive it, do I have to receive it as conclusive evidence of something?

Mr. MacIntyre: No, and that was the reason I said I appreciated your word "necessarily" there. I would like,—and I am not sure but what the statement I had made before I referred back to it had left the word "necessarily" out. So, if it is not received for what it is offered for, of course, I would like to know it because we are offering it as a contract and—

Trial Examiner Norwood: I am not receiving it as anything. I am receiving that exhibit in evidence.

Mr. MacIntyre: For whatever the whole record may show it to be?

Trial Examiner Norwood: That is right.

Mr. MacIntyre: That is all that we are offering it for.

Mr. Hinds: Let me assure counsel that my dissent
738 from his comment was not in regard to his calling this a contract. If there is any question we will concede this is exactly what this purports to be, a contract. We object to the words "contract with a purported agent." We think this necessarily slurs the good faith of one of these respondents by assuming that something which it offers purports to be something which it was not. It is not a contract with a purported agent. It is a contract exactly what it states on its face.

Trial Examiner Norwood: We don't want to go into that. I am receiving these exhibits for what they are. I am receiving it in the record.

Mr. MacIntyre: On the entire record?

Trial Examiner Norwood: Yes.

Mr. Hinds: We seem to be having a trial by slur and innuendo, and I think we should keep it as to facts.

Trial Examiner Norwood: We will not have any more of that.

Mr. Hinds: I hope not.

Mr. MacIntyre: I apologize to Mr. Hinds if he thinks that is a slur. I was merely protecting myself against Mr. Hinds' possible contention later on that I had admitted this was actually an agent.

Trial Examiner Norwood: Well, I am sure that counsel did not mean anything.

739 Mr. Hinds: It is not a slur on me. It is a slur on the respondent.

Mr. MacIntyre: My apology goes to you as well as to the respondent, Mr. Hinds.

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: I now offer into evidence a document marked for identification as Commission's Exhibit 651, as a statement by respondent Glidden on the subject of its discontinuance of lead consignments, under date of July 10, 1942, identified at record page 286.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 651 was received in evidence.)

Trial Examiner Norwood: Now, is it necessary to make a further description of these as you offer them, any further reference to their contents? Because that is the object of placing a number for identification on the paper, so that you will not thereafter have to describe it any further. When it was marked it was described, and it speaks for itself when it gets in there, and the important thing is whether or not it is to be received or not received.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: I think we will get along

740 faster if we do that.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: We now offer into the record documents heretofore marked for identification as Commission's Exhibit 663-A to K as a statement of price announcements made by respondent Glidden to its customers, and as heretofore identified at pages 283 to 285, inclusive.

Mr. Hinds: No objection.

I want to have it noted that it is not by implication conceded by not objecting that in all cases sales were made, because in some instances I understand in sparsely populated territories there were no sales, but other than that comment, I have no objection.

Trial Examiner Norwood: Received as marked.

Mr. Hinds: Also, I would like to perhaps note that in some cases the allowance of freight does not appear here.

but appears in a separate document with which I think counsel is familiar.

Trial Examiner Norwood: Thank you.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 663-A, 663-B, 663-C, 663-D, 663-E, 663-F, 663-G, 663-H, 663-I, 663-J, and 663-K were received in evidence.)

741 Mr. MacIntyre: I shall offer into the record a document marked for identification as Commission's Exhibit 728, as a statement by respondent Glidden of rail freight rates on white lead-in-oil applying from Scranton, Pa., to the destination shown thereon, on December 22, 1943, and as identified at page 287 of the record.

Mr. Hinds: Now, as to this document, we don't question its competency or its accuracy, but I do want to make this occasion of a very fundamental objection as to relevancy and materiality:

Believing as we do that there is from our standpoint nothing in this case at all except the expense of coming here and having our records examined, and so on, we have endeavored to cut down that expense, which is the substantial thing in this case, by making every conceivable concession in our answer. We see no relevancy whatsoever to freight rates, but if there be any we have conceded that our prices are uniform delivered prices. They are the same for the man who is a half a mile from the factory as they are for a man who is 250 miles away in the same zone.

If there be any God-given or Commission-given or Congress-given or MacIntyre-given right on the part of a man in our backyard to have a lower rate than a man 250 miles away, we have denied him that right. We admit that we have violated that rate, if it existed.

742 Furthermore, we admit that we have done it systematically, which Mr. MacIntyre has urged as a reason why he should pile on thousands and thousands of dollars worth of conducting this activity in various cities to prove something that we have already admitted. Now, if we can make our concession any clearer to avoid further proof of that which is already admitted, and not in issue, we will concede that we have done it systematically. How else could we have done it than systematically? Our prices are uniform at the delivery point within each zone, and if it were not systematic we would be in here defending ourselves under the Robinson-Patman Act.

For this reason, I object to this, and I shall make the

same objection, and I shall urge it seriously from the only point of view on our side of the case, that it is not in issue. Freight rates are not in issue so far as the respondent Glidden is concerned.

Mr. MacIntyre: We accept that concession, and would say that if Mr. Hinds is willing to supplement it by saying that the systematic discriminations he has referred to are part and parcel of systematic discriminations made by others, as charged in paragraph 7 of the complaint, count 1, we won't need to offer any of this as against this company.

Mr. Hinds: In the first place, we say there is no discrimination. We accept the United States Supreme
743 Court, which Mr. MacIntyre apparently overrules.

We say that when you charge a uniform delivered price there can be no discrimination. That is what we charge, a uniform delivered price.

Trial Examiner Norwood: That is right.

Mr. Hinds: If Mr. MacIntyre believes that Congress intended, as Congress said it did not intend—but if he thinks that nevertheless, despite Congress' own disclaimer that they intended that it is the mill net this arithmethical abstraction resulting from subtracting from the price some of the seller's cost of transportation, or some other cost, we admit that those are different, and if that be a discrimination he can call it that. We don't call it a discrimination.

Now, on the conspiracy charge, anything that we do by virtue of a collusion or agreement—even something perfectly legitimate, I suppose, might come in under the Sherman Act. I am not talking about that. I am talking about freight rates as against us. We admit we systematically charge the same delivered price even though the freight rates be very diverse.

Now, if I can enlarge that in any way to avoid future proof of that, which is already admitted, I will be very glad to do it, but it is very expensive to go to the various cities and spend all these weeks on this evidence which we think is not in issue.

744 Mr. MacIntyre: Well, short of a complete admission on the part of Mr. Hinds, I don't see anything to do except to continue to offer this evidence as evidence of circumstances and of facts which go to prove the allegations of the complaint, and to supplement what he has admitted.

Mr. Hinds: Well, certainly, it is not charged that the respondents make the freight rates. Those are made by the Interstate Commerce Commission. We could not conspire to make freight rates. We admit we use freight.

Trial Examiner Norwood: Just a minute. I suggested that there are some facts here which I think maybe the parties may agree on and make the subject of stipulation, but there is involved here an issue of a purpose and this issue of law. I can't take the position that the learned counsel has for Glidden and rule out the evidence here. We have to put in something to talk about, see, and on which to base your arguments and your briefs and your contentions, and so on. We cannot assume that, in fact—they made these tabulations here in an effort to show that they do bear on purpose and effect, neither one of which you agreed on, and method, so I shall have to overrule the objection and receive Commission's Exhibit 728, and say that the points that the able counsel has made he can keep in mind and urge it before the Commission.

(The document heretofore marked for identification
745 COMMISSION'S EXHIBIT NO. 728, was received in evidence.)

Mr. Hinds: May I make one further observation? Surely the Commission takes judicial—

Trial Examiner Norwood: Well, I think—go ahead.

Mr. Hinds: Surely the Commission takes judicial notice that freight rates are different according to the distances from the point of origin, and it would have been possible if we could have agreed, if Mr. MacIntyre wanted to bring in the freight tariffs, and so on, we could concede, subject to correction, that these are the ones, so that if the Commission doesn't want to take judicial notice that freight rates are different at different points, or even that they are—

Trial Examiner Norwood: That is not the point. The point is what freight rates you are using.

Go ahead.

Mr. Hinds: We don't use any freight rates in computing the price, because—

Trial Examiner Norwood: Off the record.

Mr. Hinds: —the freight rates are the same, regardless what the price is. That is one of our costs.

Trial Examiner Norwood: 728 is received.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

746 Mr. MacIntyre: Back to the record.

Trial Examiner Norwood: Yes. Proceed.

Mr. MacIntyre: I now make reference to Commission's Exhibit, for identification, 729-A and B.

In that connection, I call Mr. Hinds' attention to line 11 of page 287 where that document was identified, and where it apparently was erroneously recorded as 792-A and B, and ask him if he will agree that line in which the figure 792 appears should be changed to read "729"?

Mr. Hinds: Certainly.

Will the Court bear with me a moment?

Trial Examiner Norwood: Yes. We will have a five-minute recess.

Mr. Wright: Off the record a second, Your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a short recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: I now offer into the record Commission's Exhibit, for identification, 729-A and B as a statement by respondent Glidden of rail freight rates on white lead-in-oil and dry white lead from Scranton, Pa., to the destinations listed thereon, and as handed by an of-

747 ficial of that company to a representative of the Commission on December 31, 1943.

Mr. Hinds: I have already made by objection, I think.

Trial Examiner Norwood: Received as marked.

Mr. Hinds: No question on competency. My objection had to do with relevancy and materiality.

Trial Examiner Norwood: Received as marked.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 729-A AND 729-B was received in evidence.)

Mr. MacIntyre: That was identified at page 287 of the record.

Off the record.

(Discussion off the record.)

Mr. MacIntyre: Back to the record.

If your Honor please, I now ask that there be placed in the transcript a statement of a stipulation as to the facts dated September 14, 1945, and as signed by counsel for respondent Glidden.

Trial Examiner Norwood: And signed by the Federal Trade Commission's representative?

Mr. MacIntyre: No. It is a concession by counsel for Glidden.

Trial Examiner Norwood: Oh, I see.

Mr. Hinds: No objection.

748 Mr. MacIntyre: That is signed by both you and Mr. Duncan?

Mr. Hinds: That is right.

Trial Examiner Norwood: The stipulation is as follows:

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

(Caption—5253)

STIPULATION AS TO FACTS.

The Glidden Company, one of the respondents herein by its counsel, hereby stipulates and concedes the following to be facts, but only for the purposes of this proceeding, and reserves such objections as it may have, as to any of said facts, that the same are not relevant or material.

1. Between January 1, 1941, and November 25, 1944, The Glidden Company sold white lead in oil to its many classes of customers through and at the location of its distributing warehouses in the United States, which conducted retail departments at the following places:

Atlanta, Georgia—82 Broad St., N. W.
Baltimore, Md.—21 No. Liberty St.
749 Birmingham, Alabama—2016 First Ave., No.
Boston, Massachusetts—650 Beacon Street.
Buffalo, New York—733-735 Main St.
Charlotte, N. C.—312 South Tryon St.
Cleveland, Ohio—13538 Euclid Ave.
Columbus, Ohio—131 E. Long St.
Dallas, Texas—1029 Elm St.
Detroit, Michigan—7502-7506 Woodward Ave.
El Paso, Texas—113 No. Stanton St.
Evansville, Indiana—10-16 Main St.
Fort Worth, Texas—605 Throckmorton St.
Houston, Texas—700-02 Travis St.
Huntington Park, Calif.—6350 Pacific Blvd.
Jacksonville, Florida—50 West Bay St.

Knoxville, Tennessee—319 Wall Ave.
Miami, Florida—55 N. W. First St.
Mobile, Alabama—77 Dauphin St.
Oklahoma City, Okla.—310 N. W. Second St.
Orlando, Florida—228 N. Orange Ave.
Richmond, Virginia—109 E. Grace St.
St. Petersburg, Florida—869 Central Ave.
San Antonio, Texas—216 W. Commerce St.
Scranton, Penna.—224 Wyoming Ave.
Tampa, Florida—815 Florida Ave.
Toledo, Ohio—201 Summit St.
750 West Palm Beach, Florida—300 S. Olive St.
Washington, D. C.—1013-12th St., N. W.

2. Between said period, it has been the practice (with some exceptions) of said respondent, when making sales of white lead in oil, through and at the location of its distributing warehouses listed above, to quote and charge prices therefor in accordance with its published prices then applicable to each such location.

Dated at Cleveland, Ohio, September 14, 1945.

(Signed) Roger Hinds,
(Signed) John A. Duncan,
Attorneys for The Glidden Company, respondent herein.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: Mr. Wright now has some exhibits that he cares to take up.

Mr. Wright: I would like to call to the witness stand Mr. David R. Reel.

DAVID R. REEL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

(Documents were thereupon marked for identifica-
751 tion Commission's Exhibits Nos. 755-A, 755-B, 755-C, 755-D, 755-E, 755-F, 755-G, 755-H, 755-I, 756-A, 756-B, 757; 758-A, 758-B, 758-C, 758-D 758-E, 758-F, 758-G, 758-H, 759-A, 759-B, 759-C, 759-D, 760, 761, 762-A, 762-B, 762-C, 762-D, 762-E, 762-F, 762-G, 763, 764, 765-A, 765-B, 765-C, 765-D, 765-E, 765-F, 765-G, 765-H, 765-I, 766-A, 766-B, 766-C, 766-D, 766-E, 766-F, 766-G, 766-H, 766-I.

766-J, 766-K, 766-L, 767-A, 767-B, 767-C, 767-D, 767-E, 767-F, 767-G, 767-H, 767-I, 767-J, 767-K, 767-L, 768-A, 768-B, 769-A, 769-B, 769-C, 770-A, 770-B, 770-C, 770-D, 771-A, 771-B, 771-C, 771-D, 771-E, 771-F, 771-G, and 771-H.)

Direct Examination by Mr. Wright.

Q. Will you state your full name, address, and occupation for the record, please?

A. David R. Reel, 7225 Bradley Boulevard, Bethesda, Md.

I have been, since 1943, an attorney with the Federal Trade Commission.

Q. Did you recently have occasion to investigate The Glidden Company?

A. I did.

Q. In that connection, did you consult with officials of The Glidden Company?

752 A. Yes.

Q. And secure from their records certain documents and information?

A. From their records and from their officials.

Q. Will you state approximately the time at which that investigation was made?

A. I believe it began on June 5, 1945, and continued on for six or seven weeks thereafter.

Q. In conducting that investigation, what officials of The Glidden Company did you contact?

A. I met, while there, various officials. The ones that supplied me with the information and exhibits I desired and requested were Mr. Clifton M. Kolb, who is secretary and house counsel, Mr. Coe, who is, I believe, manager of the—he is assistant secretary in charge of the accounting and cost department; Mr. Weeks, who is in charge of the cost department; Mr. Glauner, who is one of the cost accountants; Mr. Hysell, manager of the traffic manager; Mr. David Glasser, who is an employee or clerk in the freight department, and Mr. Howard Dignan, who is also a clerk or employee in the freight department, and Mr. Radloff, who, I believe, is manager of their specialty sales.

Q. Will you state for the record, briefly, the type of information that you sought from The Glidden Company in your investigation?

753 A. I sought to secure the names of customers in various cities of various classes and to secure in-

voices showing sales and delivery of white lead, lead-in-oil, and other pigments to the customers of those various classes, and also freight information relative to the shipment of white lead and other pigments to those customers.

Q. I show you a document marked as Commission's Exhibit 755-A through I, and ask you to state what that is.

A. This is a directory of divisions and stores of The Glidden Company furnished to me by Mr. Kolb on June 8, 1945.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 755-A through I.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: You offer this?

Mr. Wright: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBITS NOS. 755-A, 755-B, 755-C, 755-D, 755-E, 755-F, 755-G, 755-H, and 755-I, was received in evidence.)

By Mr. Wright:

Q. I show you a document marked for identification as Commissioner's Exhibit 756-A and B, and ask you to 754 state what it is.

A. This document sets forth the names and locations of the various factory offices and warehouses and retail paint stores owned—of The Glidden Company for the year 1945.

Mr. Hinds: May I ask him where he got it or how he got it?

The Witness: Given to me by Mr. Kolb on June 8, 1945.

Mr. Wright: Your Honor, I offer Commission's Exhibit 756-A and B in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NOS. 756-A and 756-B was received in evidence:)

By Mr. Wright:

Q. I show you a document marked as Commissioner's Exhibit 757, and ask you to state where it is, and where it was obtained?

A. This is a document setting forth the premium zones of The Glidden Company in the various price differentials applicable thereto with respect to Euston white lead-in-oil, furnished me by Mr. Kolb on June 8, 1945, at my request.

Q. Was that given to you as a statement of the method of quoting prices of white lead-in-oil by The Glidden Company as of that time?

755 A. It was furnished to me for that purpose, as indicating the various methods of pricing white lead.

Mr. Wright: Your Honor, I offer Commission's Exhibit 757 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 757 was received in evidence.)

Mr. Hinds: I am glad to have confirmation from the Commission and its witness that the dividing of territories into so-called zones is a method. That is an argument and contention I have been making for some time, and it is very gratifying to have the Commission now recognize it.

Trial Examiner Norwood: I suggested some time ago that there are a great many things counsel may agree on that they have not yet.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 758-A through H, and ask you to state what it is, and from whom you obtained it.

A. This is a document referred to as bulletin No. 42, dated May 7, 1946, setting forth—

Mr. McDermott: '46, is it?

The Witness: '41, I am sorry.

756 —setting forth quotations on sales of white lead to various classes of customers of The Glidden Company, which document was furnished me by Mr. Kolb on June 15, 1945.

By Mr. Wright:

Q. Did that document purport to set forth the prices of white lead only or other pigments, as well, when it was given to you?

A. White lead products and other pigments, as well.

Mr. Hinds: No objection.

Are you offering it?

Trial Examiner Norwood: Received.

Mr. Hinds: No objection.

Trial Examiner Norwood: Does the record show that it has been offered?

Mr. Wright: I offer Commission's Exhibit 758-A to H in evidence.

Trial Examiner Norwood: There was no objection. It has been received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NOS. 758-A, 758-B, 758-C, 758-D, 758-E, 758-F, 758-G, and 758-H, was received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 759-A to D and ask you to state what it is and 757 where it was obtained.

A. These are documents referred to as bulletins of The Glidden Company with respect to prices and price changes in connection with lead and lead products, dated June 14, 1941, June 17, 1941, September 18, 1941, and September 19, 1941, furnished to me by Mr. Kolb on June 15, 1945.

Mr. Wright: Your Honor, I offer Commission's Exhibit 759-A to D into evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Is that "C" or "D"?

Mr. Wright: It is "D." If I stated "C" in the original question I wish it would be changed.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification was marked COMMISSION'S EXHIBIT NOS. 759-A, 759-B, 759-C, and 759-D, and received in evidence.)

By Mr. Wright:

Q. I show you a document marked as Commission's Exhibit 760, and ask you to state what it is, and where it was obtained.

A. This is a copy of bulletin No. 45, dated October 10, 1941, with respect to sales of lead products to railroads, industrial trade, and public bids, furnished me by Mr. Kolb on June 15, 1945.

Q. Was that exhibit furnished to you as a statement

of the quotations of The Glidden Company?

758 A. Yes, relative to price quotations.

Mr. Wright: Your Honor, I offer Commission's Exhibit 760 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT No. 760 was received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 761, for identification, and ask you to state what it is and where it was obtained.

A. This is a copy of bulletin No. 46 of The Glidden Company, dated December 23, 1941, with respect to price quotations on sales of lead products to railroads, industrial trade, and public bids, furnished to me by Mr. Kolb on June 15, 1945.

Q. Was that furnished to you as a quotation of prices by The Glidden?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 761 into evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT No. 761 was received in

759 evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 762-A through G, for identification, and ask you to state what it is, and from where it was obtained.

A. This is a copy of bulletin No. 47 of The Glidden Company, dated January 29, 1942, with respect to price quotations in connection with sales of lead products and other pigments to various classes of customers of The Glidden Company. This document was furnished to me by Mr. Kolb on June 15, 1945.

Q. Was Commission's Exhibit 762-A through G furnished you in response to a request for quotations of Glidden Company—

A. Yes.

Q. —prices to its customers?

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 762-A to G.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT No. 762-A, 762-B, 762-C, 762-D, 762-E, 762-F, and 762-G were received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 763 and ask you to state what it is, and from whom it was obtained?

760 A. This is bulletin No. 48—I would like to change that.

This is a copy of bulletin No. 48 of The Glidden Company, dated March 25, 1942 relative to prices on sales of lead products to various classes of customers of The Glidden Company, furnished to me by Mr. Kolb on June 15, 1945.

Q. Was that furnished to you in response to a request for price quotations of The Glidden Company to its customers?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 763 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT 763 was received in evidence.)

By Mr. Wright:

Q. I hand you herewith a document marked Commission's Exhibit, for identification, 764, and ask you to state what it is and from whom it was obtained.

A. This is a copy of bulletin No. 49 of The Glidden Company, dated May 6, 1942, with respect to prices on sales of lead products to various classes of customers furnished to me by Mr. Kolb on January 15, 1945, in response to my request for price information relative to sale of white lead products and other pigments of The Glidden Company.

761 Mr. Wright: Your Honor, I offer Commission's Exhibit 764 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 764, was received in evidence.)

By Mr. Wright:

Q. I hand you Commission's Exhibit 765-A through I, for identification, and ask you to state what they are and from whence they came?

A. These documents are bulletins and inter-office correspondence relative to the prices on sales of lead products to various classes of customers of The Glidden Company, furnished to me by Mr. Kolb June 15, 1945, at my request, with respect to prices of The Glidden Company on sales of lead products and other pigments.

Mr. Wright: Your Honor, I offer Commission's Exhibit 765-A through I into evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 765-A, 765-B, 765-C, 765-D, 765-E, 765-F, 765-G, 765-H, and 765-I were received in evidence.)

762 By Mr. Wright:

Q. I hand you herewith Commission's Exhibit 766-A through K, and ask you to describe what that is and from whom you obtained it?

A. These are price lists regarding prices on white lead-in-oil of The Glidden Company for various classes of customers in various zones, furnished to me by Mr. Kolb on June 13, 1945, in response to my request for prices of The Glidden Company relative to the sale of white lead and other pigments.

Q. Calling your attention now to 766-A, 766-C, and 766-E, was any distinction made between those three cards by Mr. Kolb?

A. Yes, these prices set forth on the lists were discussed, and the following information was obtained: Card identified as 766-A governed prices on sales of white lead to distributors in the par zone. Card identified as 766-C were distributors' prices in the one-eighth-cent zone. The card identified as 766-E set forth distributors' prices in the quarter-cent zone.

Q. I call your attention to Commission's Exhibit 766-A, the symbol DA-14. Do you know the significance of that symbol appearing on that exhibit?

A. It is a card referring to the different zones to which these price lists apply.

Q. Can you explain that any further? Does the 763 letter "D" in the symbol have any significance?

A. The letter "D" means dealer, and "A" means "par zone."

Q. I call your attention to a symbol "DB-14," on Commission's Exhibit 766-C.

A. "D" means distributor, "B" is the code for one-eighth zone, and on Exhibit identified as 766-E, "D" is the symbol used by Glidden Company with respect to distributors. "C" has reference to the quarter-cent zone.

Q. I call your attention to the symbol on Commission's Exhibit 766-G, which appears at the upper righthand corner, A-13.

Do you know the significance of that symbol?

A. The "A" again, with reference to these price lists, has reference and is used by The Glidden Company to designate par zone prices quoted on sales of white lead.

Q. What is the source of your information regarding these symbols and the application of the price cards?

A. When these cards were given to me by Mr. Kolb, we discussed their method of identifying the various price lists, and at that time I wrote or made a notation on the card as to the various zones to which they applied.

Mr. Kolb at the time also had to secure information relative to this code. He was not certain about it, but he, through some source, found out the nature of their code symbols here and he explained it to me.

764 Mr. Wright: Your Honor, I offer Commission's Exhibit 766-A through K in evidence.

Mr. Hinds: No objection, except I do not want to have my failure to object imply that sales were in all cases made in these territories or that this states the story as to freight allowances as to which I think certain of the documents have to be consulted.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 766-A, 766-B, 766-C, 766-D, 766-E, 766-F, 766-G, 766-H, 766-I, 766-J, and 766-K were received in evidence.)

By Mr. Wright:

Q. I hand you herewith Commission's Exhibit 767-A

through K, and ask you to state what that is, and from whom it was obtained.

A. These are price lists furnished to me by Mr. Kolb June 13, 1945, with respect to the prices quoted on sales of white lead-in-oil in the various zones or territories of The Glidden Company.

Q. I call your attention to the symbols on the upper right-hand corner of the various exhibits and ask you to state what the significance of those symbols is.

Mr. Hinds: May I suggest that it is the same story, and he will simply so state, and it will save time.

765 Mr. Wright: I have no objection to that, but I want the witness to carry through since there are more different symbols on this than there were on the last.

Trial Examiner Norwood: Go ahead.

The Witness: The symbol "B" refers to the one-eighth cent zone; the symbol "C" refers to the one-fourth-cent zone; the symbol "CC" refers to the three-eighths-cent zone; the symbol "D" refers to the one-half cent zone; the symbol "E" refers to the seven-eighths-cent zone; and the symbol "F" refers to the one-cent zone.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Will you read the answer, please?

(The reporter read the last answer.)

By Mr. Wright:

Q. Will you examine Commission's Exhibit 767-I, and state again the significance of the symbol?

A. As I stated erroneous, the "E" refers to the five-eighths cent zone.

Trial Examiner Norwood: That is correct, then, the last explanation?

The Witness: Yes.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Off the record.

766 (Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Hinds: Has it been offered, as yet?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Is there any objection to the proffer?

Mr. Hinds: No, sir, I make the same reservation as before.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 767-A, 767-B, 767-C, 767-D, 767-E, 767-F, 767-G, 767-H, 767-I, 767-J, and 767-K were received in evidence.)

By Mr. Wright:

Q. I show you Commission's Exhibit 768-A and B, and ask you to state what it is, and from whom it was obtained?

A. This is a contract dated January 1, 1941, by and between Heath & Milligan Manufacturing Company, a division of The Glidden Company, and Montgomery Ward Company, with respect to prices on sales of white lead-in-oil by The Glidden Company to Montgomery Ward Company.

This contract was furnished me by Mr. Kolb through the mails on October 5, 1945.

Q. Was that furnished to you as setting forth the terms of sale applicable to Montgomery Ward & Company 767 by The Glidden Company as of the date of that contract?

Mr. Hinds: I object on the ground that having stated that it is a copy of a contract furnished by the respondent, certainly any further identification of it is purely incompetent.

The document speaks for itself. When you once say it is a contract between the two parties, you look at the contract to find out what it is.

Trial Examiner Norwood: He can tell us what he asked for and what the officials who gave it to him stated it was.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: Yes.

Mr. Wright: I again offer Commission's Exhibit 768-A and B in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document referred to was marked COMMISSION'S EXHIBIT NO. 768-A and 768-B and received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Ex-

hibit 769-A to C, for identification, and ask you to state
768 what it is, and where it was obtained.

A. This is a copy of a contract dated December 29, 1942, by and between Heath & Milligan Manufacturing Company, a division of The Glidden Company, and Montgomery Ward & Company with respect to prices on the sale of white lead-in-oil furnished to me by Mr. Kolb on October 5, 1945, in response to my request for prices with relation to the sale of such white lead-in-oil by The Glidden Company to Montgomery Ward & Company.

Q. I call your attention to the word "canceled" stamped on various sheets of that exhibit. Were those words on the exhibit when it was furnished to you?

A. Yes.

Q. Was any explanation made to you regarding those stamps by officials of The Glidden Company?

A. No.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 769-A to C in evidence.

Mr. Hinds: No objection.

Mr. Ewing: May we see it?

(Document handed to Mr. Ewing.)

Mr. Ewing: No objection.

The Witness: With reference to this contract, it was furnished me when I requested copies of contracts which had been entered into and executed by the parties involved.

769 Mr. Hinds: You mean performed?

The Witness: Performed.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 769-A, 769-B, and 769-C, was received in evidence.)

By Mr. Wright:

Q. I show you a document marked for identification Commission's Exhibit 770-A to C, and ask you to state what it is and from where it was obtained.

A. This is a copy of a contract entered into by Euston Lead Company, a Division of Glidden Company, with distributors of that company in the sale and distribution of white lead products, otherwise known as a distributor agreement.

Mr. Hinds: Don't you mean a form rather than a copy?

The Witness: It is a copy.

Mr. Wright: I offer Commission's Exhibit 77-A to C in evidence.

Mr. Hinds: No objection, except I call attention to the fact that it is a printed form. It is not a copy of anything.

Mr. Wright: I accept that.

Trial Examiner Norwood: Received.

(The document referred to heretofore marked for 770 identification COMMISSION'S EXHIBIT NO. 770-A, 770-B, and 770-C was received in evidence.)

Mr. Hinds: And I do not imply that there have been such contracts, or there have not. I don't happen to know if there were any transactions on that form.

By Mr. Wright:

Q. I hand you herewith documents marked for identification Commission's Exhibit 771-A to G, and ask you to state what those are, and where they came from.

A. These are copies of price lists setting forth prices governing the sale of white lead-in-oil, and other pigments; by The Glidden Company in the various zones in what is referred to as their West Coast area.

Q. Were any representations made to you as to the areas in which those price cards applied?

Mr. Hinds: Do you mean statements?

Mr. Wright: Were any statements made.

The Witness: They were discussed by Mr. Kolb and I. The price lists, themselves, set forth the various zones in which they apply. For example, the price list identified as 771-A states "par zone," and states that this zone includes sales in San Francisco south to San Jose, inclusive, Oakland, Berkley, Richmond to Haywood.

By Mr. Wright:

Q. Do other exhibits likewise set out the geographi-
771 cal areas to which they are applicable?

A. Yes, and the zone numbers applicable to those areas.

Mr. Wright: I offer Commission's Exhibit 771-A to G in evidence.

Mr. Hinds: No objection, but again I don't want to have it implied that we made sales in all of those zones, or that this tells the whole story in regard to freight allowances.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification

"COMMISSION'S EXHIBITS NOS. 771-A, 771-B, 771-C, 772-D, 772-E, 772-F, and 772-G," were received in evidence.)

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2 p. m.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 2 o'clock p. m. of the same day.)

772 Afternoon Session.

2 P. M.

Trial Examiner Norwood: The hearing will come to order, reconvened at 2 p. m.

The witness will resume the stand.

DAVID R. REEL resumed the witness stand and testified further as follows:

(Documents were thereupon marked for identification Commissions' Exhibits Nos. 772-A, 772-B, 772-C, 772-D, 772-E, 772-F, 772-G, 772-H, 772-I, 772-J, 772-K, 772-L, 772-M, 772-N, 772-O, 772-P, 772-Q, 772-R, 772-S, 772-T, 772-U, 772-V, 772-W, 772-X, 772-Y, 772-Z, 772-Z-1, 772-Z-2, 772-Z-3, 772-Z-4, 772-Z-5, 772-Z-6, 772-Z-7, 772-Z-8, 772-Z-9, 772-Z-10, 772-Z-11, 772-Z-12, 772-Z-13, 772-Z-14, 772-Z-15, 772-Z-16, 772-Z-17, 772-Z-18, 772-Z-19, 772-Z-20, 772-Z-21, 772-Z-22, 772-Z-23, 772-Z-24, 772-Z-25, 772-Z-26, 772-Z-27, 772-Z-28, 772-Z-29, 772-Z-30, and 772-Z-31.)

Mr. Wright: Your Honor, I would like to go back and ask the witness one question to clear up his testimony regarding an exhibit which was received in evidence this morning.

Trial Examiner Norwood: Yes. Go ahead.

773 *Direct Examination (Resumed) by Mr. Wright.*

Q. I call your attention to Commission's Exhibit 767-I, which is a price list effective January 26, 1942, marked "E-14" in the key number.

Did I understand you to state for the record that this

exhibit was applicable to the zone seven-eights of a cent per pound above par?

A. I believe I originally stated that this was in the seven-eighths cent advance price zone, and then changed that testimony to read that it was in the five-eighths cent advance price zone, but upon looking if over that testimony was in error, and I find that that particular exhibit relates to prices in the three-fourths cent advance price zone.

Q. Mr. Reel, I understood you to state this morning that you examined numerous invoices of The Glidden Company in connection with your investigation?

A. That is true.

Q. Where were these invoices supplied to you from, and by whom?

A. The invoices with respect to the Cleveland branch, or Cleveland division, were supplied to me by and under the authority of Mr. Weeks after he was contacted and requested to supply this information by Mr. Kolb. The information and copies of invoices relating to the other divisions of The Glidden Company were supplied
774-775 directly in response to a letter of Mr. Kolb's to those divisions requesting copies of invoices relating to sales of white lead and white lead-in-oil.

With reference to these invoices supplied by the other divisions other than the Cleveland division of Glidden Company, the only item appearing on the copies of invoices was that showing white lead and white lead-in-oil. That was to facilitate the investigation and not cause too much hardship upon the part of the company.

Q. Did you make any notations or tabulation of the information from the invoice, and other material that was supplied you by The Glidden Company?

A. Yes, I did.

Q. I hand you a document marked Commission's Exhibit 772-A through Z-31, for identification, and ask you to describe that.

A. This document, consisting of numerous pages, contains a tabulation of price and freight data on sales of white lead to various customers of The Glidden Company in various parts of the United States.

Q. Did you prepare this exhibit, yourself?

A. I didn't prepare all of the pages of this exhibit for the reason that I had some assistance by Mr. Depue and Mr. Kelaher who took the copies of invoices as they were

supplied me by The Glidden Company and from those
776 invoices tabulated the data appearing thereon. All of the entries in this tabulation made by Mr. Depue and Mr. Kelaher were later checked by me from the copies of the invoices, and I added to their tabulations the freight data which appears on these various sheets.

Q. I call your attention to Commission's Exhibit 772-B. With reference to the material appearing in the upper left-hand corner, will you explain those notations?

A. That was a code used in order to distinguish different classes of customers whose names appear in the left-hand column on this page, such as "DD" for "Direct Dealer," and so forth.

Trial Examiner Norwood: Are those the same symbols that are used on those cards?

The Witness: No. These have to do with the classification of customers, while the others have classification of zones or the differential.

Trial Examiner Norwood: I see.

By Mr. Wright:

Q. Who supplied the classification of those customers in that form? Was that done by you or was it done by The Glidden Company?

A. On the exhibits set forth as—identified as 772-B through 772-U the classification of customers was check-marked by Mr. Radloff, who is manager of the specialty sales department of The Glidden Company. The papers were handed him for that purpose.

777 Q. I call your attention to the columns marked "Shipping Orders," "Number," and "Date Shipped," and ask you to explain the information appearing under that?

A. The column—

Trial Examiner Norwood: Now, I don't think that we can go into the explanation of this exhibit. Let us identify it and you can testify about it if and when it is received in evidence. It is not in evidence yet. So I would just identify it and then you can go into those explanations and matters.

By Mr. Wright:

Q. Mr. Reel, are we correct in our understanding of your testimony that all of the information appearing on Commission's Exhibit 772-A through Z-31 is a statement

of information appearing on the records of The Glidden Company and as supplemented by officials of that company?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 772-A through Z-31 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Hinds: I should probably want some preliminary cross-examination.

Trial Examiner Norwood: You may have any questions with respect to its identity only.

Mr. Hinds: First, I want to affirm the understanding I had that we are to be furnished a copy of this. They
778 have courtesy allowed us to look at it overnight. I am satisfied with that privilege, but we would like to have a copy as the other respondents have. I understood it will be furnished to us.

Now, before proceeding with my cross-examination within Your Honor's limitation, I would like to ask the purpose of this offer because my interest in it will depend somewhat on what the purpose is. I understand in part it will be on the freight rate question?

Mr. Wright: Your Honor, that exhibit is offered to show transactions of The Glidden Company with certain customers at certain times covering certain products, including all the details recorded there regarding such transactions.

Mr. Hinds: That doesn't help me very much because we have at least three issues in this case. We have conspiracy; we have the issue which, if I will be permitted, called the fantastic issue that uniform delivered prices are discrimination per se which I will dismiss, disposing of it as a question of law in accordance with the United States Supreme Court rulings; and then we have an important issue, apparently seriously urged, but up to date I haven't had any intimation that it is going to be pressed here, that there may have been discriminations under the Robinson-Patman Act with respect to individual sales, that is, a sales to Jones and a sale to Smith, inside of the same zone. Now, it is the latter I am concerned
779 with because if we are to be confronted with that sort of information our burden, of course, will be enormously increased.

Could you be helpful in that respect?

Mr. MacIntyre: I would like to answer that question.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: To the extent that the evidence contained in this exhibit concerns prices charged by The Glidden Company, or that relates to any showing as to what the prices were that were quoted as well as those charged, we offer it for whatever it can show concerning differentials in those prices.

When considered in the light of other evidence, not only in the exhibit but which has heretofore been received in the case, and which we expect to offer bearing on the question of discrimination in price, as well as the other charges under count 1, to which Mr. Hinds has made reference—

Mr. Hinds: In other words, this is offered in part, at least, to support a charge that even as between one customer and another in a given zone we have been discriminating; is that right?

Mr. McIntyre: Under count 2 there is a charge that Glidden has through discounts given one customer and not another; and through the use of regional discrim-
780 inations or discriminations of other types, unlawfully discriminated between customers.

Mr. Hinds: Well, then, that will considerably add to the burden of our difficulties here. Had it been merely the freight rates, or these general charges, I think we could have relied on the law in the Supreme Court decisions rather than a detailed consideration of the facts.

Then, Mr. Reel, you have got the information in the lefthand column, customers, their addresses I suppose from the invoices?

The Witness: That is right.

Mr. Hinds: The four classifications were in each case given to you by some official and are their own notions of what these classifications are?

The Witness: That is right.

Mr. Hinds: Officials of The Glidden Company. Then I see a column "Shipping Orders," with numbers. Those are from the invoices or—

The Witness: That is right.

Mr. Hinds: From the orders?

The Witness: Those are from the—

Mr. Wright: Your Honor, I submit that counsel is going beyond cross-examination on identification of the document and into the contents of it. We still haven't established the contents of the document.

781 Mr. Hinds: I want to know what these things mean.

Trial Examiner Norwood: Confine yourself to the identification.

Mr. Hinds: I notice there is a cover on this thing. Is that part of the offer?

Mr. Wright: That has been marked by the reporter. We don't know if it is part of the offer.

Mr. Hinds: This cover describes what is contained therein as data as to sales during the first and last quarters of 1941 and first quarter of 1943. Then I notice that there are columns here on each of these pages as to dates shipped.

Now, in bringing these sales within the quarter, have you taken the date of shipment as the significant date, or have you taken some earlier date when the order was sent in and accepted, or a contract was made constituting the contract of sale?

The Witness: It was established—

Mr. Wright: Your Honor, I submit that goes to the contents of the document.

Mr. Hinds: If Your Honor please—

Trial Examiner Norwood: Well, you asked a few of those questions, but let him answer that, and then I will ask you to confine your examination to voir dire questions.

Mr. Hinds: I can't possibly make an examination until I can find—

782 Trial Examiner Norwood: You will get that if and when the document is admitted in evidence, then you may cross-examine him at length on all those things.

Mr. Hinds: Before it is admitted in evidence I want to be able to learn at least enough about it to see what if any objection I have to it at the threshold.

Trial Examiner Norwood: Go ahead.

Mr. Hinds: I think Your Honor will see that my questions will all be directly pertinent to the preliminary question solely as to admissibility.

Trial Examiner Norwood: I am sure counsel wants—

Mr. Hinds: Counsel has stated—

Trial Examiner Norwood: —to go into that thing very thoroughly, and for our convenience, if you will, just confine your questions there to matters pertaining to this identification, and to identification only just at this time. In a very few minutes you may go into cross-examination.

Mr. Hinds: Well, it isn't, I hope, going to be a matter of minutes. It is going to be a matter of logical—

Trial Examiner Norwood: The point about it is we

want to keep the record clear here and we do not want questions going into the record concerning the contents of a paper which has not been received in evidence. We want to keep the record clear of any such thing.

Mr. Hinds: Have you grouped these according to
783 the date of the sale, or according to the date of the invoice or shipment where the two have been different?

Trial Examiner Norwood: Answer that.

The Witness: The dates used in the column designated "Date Shipped" are dates taken from the face of the shipping orders as they appeared, and, as I understood, it is the policy of the company to invoice on the day of shipment.

Mr. Hinds: Move to strike out the answer as unresponsive. I am not making a distinction between the shipment date and the invoice date, which very likely would be the same date. I am making a distinction between the date of the sale and the determination of price, which may have been a day, a year, or six months before. That is what I am trying to find out.

Trial Examiner Norwood: I think he may give us some information on that subject.

Motion denied. You may clarify it.

Mr. Hinds: As an instance, on page 4, line 25, you have a purported sale to William Downey, with a date of shipment of December 31, 1940; is that right?

The Witness: That is what it shows.

Mr. Hinds: Now, does that come, according to your method of grouping these, within the first quarter of 1941 or the last quarter of 1941, or the first quarter of 1943?

The Witness: No. I can explain that.

784 Mr. Hinds: I will give you an opportunity in a minute.

On page 5, lines 29 and 30, I find transactions dated respectively as to the date of shipment, December 5, 1940, and December 16, 1940. Does that come within any of those three quarters under your method?

The Witness: No.

Mr. Hinds: Well, then—if you want to explain that I will be glad to have you so I understand what you did here.

The Witness: The shipments of The Glidden Company contained far more items of other products and merchandise manufactured and sold by The Glidden Company than

white lead or white lead-in-oil, or any other pigments, and in order to find invoices which would show the sale of white lead and the shipment of white lead, and in an endeavor to get various classes of customers in the same towns, it was necessary to either obtain invoices prior to or subsequent to the dates as set forth in the three quarters shown on the tabulated sheets.

Mr. Hinds: In other words, then, this is not precisely a tabulation with respect to sales during these named quarters but is a tabulation of sales which, for the most part, are within those three classes, but in some instances, so that you would get a more representative grouping, you have departed from this self-imposed selective basis; is that right?

785 The Witness: That is right.

Mr. Hinds: And gone into certain other quarters?

The Witness: That is right.

Mr. Hinds: To which, by the way, I make no objection. I just wanted to see what we have before us.

However, it is a fact, is it not, that you have not taken and have not set down here the date when the order was received or accepted, or in cases where there was a more formal contract of sale fixing the price, the date of that contract; is that right?

The Witness: That is right.

Mr. Hinds: You have only given us the date of either the shipment or the invoice?

The Witness: That is true.

Mr. Hinds: Have you in your possession information as to the dates of sale which I define as either order or acceptance, or a more formal contract? Have you any of those dates?

The Witness: Only with respect to sales under your distributor agreements. I believe there is a page in there that will show it.

Mr. Hinds: And in those instances, is that date set forth in this tabulation as well as the date of shipment or invoice?

Well, I will reframe the question.

786 Except in the case of what you have last referred to, distributor agreements, you have no information as to the dates when any of these sales became a matter of agreement between the parties?

The Witness: That is right.

Mr. Hinds: Does this cover dry white lead, or does it cover only white lead-in-oil?

The Witness: It is presumed to cover—it does cover both dry white—dry white lead and white lead-in-oil.

Mr. Hinds: Does it cover any other lead pigments?

The Witness: No.

Mr. Hinds: As to the freight data, you say you obtained that from Glidden's officials?

The Witness: That is true.

Mr. Hinds: In many cases the invoice which you examined covered other products than those that you have made the subject of this tabulation?

The Witness: In the majority of cases.

Mr. Hinds: In those cases, was it your understanding that the rate applicable to whatever quantities were shipped by The Glidden Company, including other products such, for example, as a carload rate, was taken, or was the rate taken and entered by you which would have been applicable only to a smaller quantity, say a hundred pounds, referred to in this tabulation, if you know?

787 The Witness: The instructions given to Mr. Hysell, who is the manager of the freight department, and his instructions to Mr. Glasser and Mr. Dignan were to figure the freight—or obtain the freight that applied to that amount of white lead contained in the shipment on the basis of whether that shipment was a carload, truckload, less-than-carload, or less-than-truckload.

Mr. Hinds: Then this purports to be, so far as you know is, a record of that portion of an actual total freight payment which could be prorated according to actual pounds to that portion which you have made the subject of your tabulation?

It is actual but prorated from a larger total; is that it?

The Witness: That is true.

Mr. Hinds: Now, I think there are some pages here called inter-company sales—billings. Can you refer to those? I don't remember the number of the pages. Refer to pages beginning 24-A, which has been marked here by the stenographer Z-11 and thereafter, Z-12, and so forth.

Now, these are transactions for so-called billings between one arm or division of The Glidden Company and another; are they not?

The Witness: That is right.

Mr. Hinds: And, of course, they do not come
788 within your general characterization of sales, they were not sales and did not purport to be sales?

The Witness: It is a matter of debate there whether or not they are actual sales or charges made for white lead furnished.

Mr. Hinds: Well, in both cases if it was a sale the buyer and the seller was the same company, is that right?

The Witness: That is true. They can't sell to themselves.

Mr. Hinds: In other words, for some reason, which was or was not explained to you, The Glidden Company has a pretense, fiction, of invoicing at a figure from one department to another of the same company? That is what you are referring to?

The Witness: That is right.

Mr. Hinds: I think that completes my preliminary cross-examination.

I object to the document. I will first take up the relatively unimportant sheets, Z-11 and following, which have to do with so-called inter-company billings on the general ground that they are irrelevant. It is no question of competency, because these are not sales, they are not transactions with which the Commission can be concerned, neither under their conspiracy charge nor a Robinson-Patman charge because they are mere fictional appearances of sales done for some purpose which may or may not be explained, but they are not sales.

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Trial Examiner Norwood: You mean sales from the company to the company's agents?

Mr. Hinds: No. No. They are not even that. These are not sales under any theory. The Cleveland office, the Cleveland branch, may ship some stuff to the Chicago branch, and for some purposes of keeping the people in competition with one another, or something of that sort, inside of the company they go through the fiction of making out an invoice. I suppose it has to do with checking up volume of business, or something of that sort, on the part of the local managers. But at any rate it doesn't even purport to be a sale, nor do these things under any conceivable notion of the word "price"—even our opponents, I don't think, will claim they are prices.

That concludes my first objection.

Does Your Honor want to rule on that, or shall I go ahead?

Trial Examiner Norwood: No. Go ahead.

Mr. Hinds: Now, as to so much of the document as is with respect to freight rates, I renew the objection that I

have heretofore made addressed to relevancy which Your Honor has overruled, and I will not argue that further.

As to the document in so far as it is to be offered
790 in support of a charge that we have discriminated between individual purchasers from us within a particular zone or between zone and zone as individuals, I object on the ground that the evidence is completely irrelevant in that without the relevant or significant date, no comparison Robinson-Patman wise can be made between one price and another. The law is not violated, nor is there even a presumption of violation by charging one man a price in December of 1942 and another one 20 years later.

Trial Examiner Norwood: That is right.

Mr. Hinds: In other words, the date of shipment, which is the only date here, which happens to be in most cases the date of invoice—the same thing usually is the date of shipment or invoice, in no way even suggests the vital or significant Robinson-Patman date because it may have been under a contract of sale, general or specific, made a year, six months before, or it may have been a mere order without formal contract fixing price accepted by the seller and shipment for some reason or other may have been requested, not shipped for three months because of difficulties in transport or materials, might not have been made for three months.

No presumption, I maintain, arises from the shipment date. The burden of proof certainly as to the date of the transaction is on the Government. So they cannot shift
the burden of proof by us by coming in here with a
791 document which merely gives shipment dates, putting the burden on us to show that the sale had been a year before or six months before, or a week before.

So I say, lacking that, unless they promise to connect it up—not putting the burden upon us—unless they promise to connect it up, it is utterly irrelevant, has no relationship whatever to this case.

Trial Examiner Norwood: No proper basis for comparisons?

Mr. Hinds: No, sir. That is as vital a thing as the two prices, or the fact that the goods are similar. As to those points, by the way, I am not raising any point because I assume that those other factors will become apparent from this tabulation.

But, lacking the significant date, the thing fails utterly. That is the basis of my objection.

Mr. MacIntyre: If Your Honor please, I would like to make in part the reply to these objections.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: And I address myself, first, to the portion of his objection relating to those pages marked Z-11 and following Z-11.

Mr. Hinds in his objection in that connection overlooked the fact that the freight applicable to the shipments made from the factory to distribution points is a factor that
792 he as well as counsel for the Commission are taken into account in determining the nature and extent of the net price discriminations involved, or at least some of the—

Mr. Hinds: You mean mill net—

Mr. MacIntyre: Or at least some of them.

Trial Examiner Norwood: Wait a minute.

Don't take down any remarks that are made until the counsel has the floor.

Mr. MacIntyre: Or at least some of the transactions entered into by The Glidden Company. It is only through that information that one is enabled to determine with respect to sales from warehouses how much freight was actually incurred from the factory.

In other words, these so-called inter-company—they, I think, should more appropriately be called intra-company—transactions, it is only through these that you can determine how much freight the company actually incurred as a cost, if it was actually a company cost, on freight, all the way along the line from its factory to the consumer. For that reason, if for no other, these pages of Z-11 and following are relevant to the issues here.

Mr. Hinds: Shall I answer that point?

Trial Examiner Norwood: No. No. You have had your time. I will hear from you later.

Was that data used for that purpose, Mr. MacIntyre?

793 Mr. MacIntyre: They are usable for that purpose. We offer them for that, and all other purposes for which they are found to be relevant when the record is closed.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: Now, as to the other pages, as well as those, they go to the charge included in count 2, and particularly paragraph 11 of count 2, which charges that Glidden has been, and is now, classifying its customers to receive from Glidden quantity, trade, and regional discounts, and from the quoted prices that it makes, so that

by virtue of such classifications and action that Glidden takes pursuant thereto, it charges, demands, accepts, and receives higher prices in connection with the sale of lead pigments in commerce from some of its customers than from sales to other customers.

And, further, the exhibit is relevant to the charges under count 1, which charges the unlawful course of conduct on the part of all of these respondents.

Trial Examiner Norwood: What do you say about the absence of any dates which would be reasonable basis of comparison as between sales to the vendees mentioned there, and others in the matter of determining discrepancies?

Mr. MacIntyre: Well, under the Robinson-Patman Act if you charge—that is, make a sale at different prices on "X" date that is actionable as a price discrimination if the prices are different. It is also actionable if on "Y"
794 date you demand that customer "A" pay you more for a shipment made to him than on that date customer "Z" is compelled to pay you on a shipment—unless you provided both with the opportunity of ordering on the same dates and under the same conditions, unless the discrimination is justified by differences in costs, and provided it has the effect specified in the statute.

Mr. Hinds: Now, as to the first point, namely, the intra-company billings, which I am told we call inter-house transfers, I will concede that if there is any merit whatsoever in Commission's contention about freight data, which is one of our costs—it has nothing to do with our prices; it is one of our costs—this is no more objectionable than any of the other barrels of material we have taken at such vast expense. It does not add anything. If that be the purpose, I suppose if they can look at our freight costs they can go back and see the costs whereby we transferred our goods from one of our own warehouses to another. I maintain none of that has any relevancy.

If we were charging different prices—which we are not. We are accused of charging the same price. If we were charging different prices then we would have the burden of coming in and justifying our differences in costs of not only freight but of selling, and other costs, but we are not doing that. We come in charging the same price, so, therefore, I see no relevancy—since we don't bring it up—
795 of our freight costs.

Now, as to the second part, which goes to the lack

of the date, I think my opponent has impliedly conceded that it is not needed here at all because he hasn't attempted to show that the date of shipment or invoice has any relevancy, so he is arguing that without any showing of date at all you can—

Trial Examiner Norwood: The date of invoices has no relevancy in so far as indicating when that sale might be?

Mr. Hinds: That is true. So that if he came in here more humbly and said, "We admit that there is a vital thing lacking here, namely, the date, which we will undertake to supply," then Your Honor might well say, "Well, you can't prove all of your case at once, and we will take this under consideration, subject to your proving it later."

But I don't want to be in the position of having that burden upon us.

Trial Examiner Norwood: That has nothing to do with your burden here if you are going to admit some evidence here pursuant to the burden which is on him.

Mr. Hinds: Of course. But, as it stands it may lack relevancy. He may bring in the relevant dates, but until he does that it should be admitted only conditionally, if at all.

796 Trial Examiner Norwood: I think the dates of invoices mean a great deal.

Mr. Hinds: In what respect?

Trial Examiner Norwood: As to when goods were shipped, and at what price.

Mr. MacIntyre: Last summer when we undertook to secure information concerning the prices at which sales—

Mr. Hinds: Is this off the record?

Mr. MacIntyre: This is on the record.

Mr. Hinds: Then I object to counsel making a statement which necessarily is evidentiary. He is now stating facts. He is not under oath. Let him take the witness stand if he is competent.

Trial Examiner Norwood: Now, will counsel be seated and let me hear from counsel for the Commission?

Go ahead.

Mr. MacIntyre: Last summer when we undertook to secure information concerning the prices which had been quoted and charged by The Glidden Company, as well as other respondents in this case, we spared no effort to secure from those companies information that they could furnish us showing the dates on which they had made sales and shipments pursuant to such sales within certain

specified periods of time. Wherever the company could furnish a showing that it had made a shipment, but was unable to show us whether or not the order was ac-
797 cepted on that day, or five days prior, we took the best information that they said they had, and all of it that related to it, and the information that we have before you and in this offer is the information that we received from them, and particularly from the Glidden Company.

Now, we are finished on just what we did request.

The next exhibit to be marked for identification in this case, and which we propose to offer, will throw further light on just how far we went in an effort to secure price information, and just what we did ask the company to furnish us on this particular exhibit, and we would like therefore, if you care to, to hold the ruling on this until we can have another exhibit offered which relates to this, and have it considered along with it.

Trial Examiner Norwood: I am not going to withhold the ruling on this. I am not going to reject evidence here on the grounds that the dates of the invoices and the statements in the invoices are not evidence. I think that would be absurd.

Mr. Hinds: Do you think that would create a presumption as to what the date of the sale was?

Trial Examiner Norwood: I don't know the date of the sale. I haven't considered just where that comes in.

Mr. Hinds: One of them is nine months.

Trial Examiner Norwood: Let us let the evidence
798 unfold and let us see how material that is.

But here is some evidence here about your prices and about invoices, and about dates here, and it appears to me to be relevant and material, and it is the same class of information that we have already received here, and I am going to overrule the objection and receive Exhibit 772-A to Z-31, and if I can find any part thereof is not connected, and that there is no basis for comparisons whatsoever, why, I will strike it or utterly disregard it in making my findings and report on this thing.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS Nos. 772-A, 772-B, 772-C, 772-D, 772-E, 772-F, 772-G, 772-H, 772-I, 772-J, 772-K, 772-L, 772-M, 772-N, 772-O, 772-P, 772-Q, 772-R, 772-S, 772-T, 772-U, 772-V, 772-W, 772-X, 772-Y, 772-Z, 772-Z-1, 772-Z-2, 772-Z-3, 772-Z-4, 772-Z-5, 772-Z-6, 772-Z-7, 772-Z-8, 772-Z-9, 772-Z-10, 772-Z-11, 772-Z-12, 772-Z-13, 772-Z-14, 772-Z-15.

772-Z-16, 772-Z-17, 772-Z-18, 772-Z-19, 772-Z-20, 772-Z-21, 772-Z-22, 772-Z-23, 772-Z-24, 772-Z-25, 772-Z-26, 772-Z-27, 772-Z-28, 772-Z-29, 772-Z-30, and 772-Z-31 were received in evidence.)

Mr. Hinds: I will move to strike out, or suggest that Your Honor disregard, so much of my opponent's statement as was factual, particularly in so far as it was not
799 consistent with the actual testimony what we have had from the witness.

Trial Examiner Norwood: Well, now, I have been patient and heard both the counsel out in anything that they wanted to say, and there is nothing prejudicial there. Counsel's statements are not evidence and they are not taken as such by us, and there is no jury here to be prejudiced. When you start striking counsel's comments, you never know where to stop. It is very difficult.

Mr. Hinds: Then I would like to make a factual statement in reply.

Trial Examiner Norwood: And I don't think I will undertake it.

Mr. Hinds: And I will ask the same privilege of making a factual statement in response to my opponent's factual statement.

Trial Examiner Norwood: Certainly. Certainly.

Mr. Hinds: Namely, that we gave them courteously and cooperatively every bit of information that they asked us for, and they didn't have any relevant information with respect to these dates of sales. They asked us only for the dates of the invoices, which we gave them. I had no opportunity to prepare their case for them, and we assumed that they were going to use this for some other purpose. Had I known for a moment they were going to use this for
800 the purpose they now announce, I think I would have helped them prepare their case so I wouldn't waste my time.

Trial Examiner Norwood: Thank you. Go ahead.

Off the record.

(Discussion off the record.)

(Documents were thereupon marked for identification Commission's Exhibits Nos. 773 and 774.)

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 773, and ask you to state what it is, and if you recognize it.

A. This is a letter dated June 26, 1945, written by Clifton M. Kolb, to Mr. John C. Sparks, of the San Francisco office of Glidden Company, setting forth various requests made by the writer of Mr. Kolb for the purpose of securing the information desired in this investigation.

Q. Where did you obtain this, if you recognize it?

A. This was furnished to me by Mr. Kolb, or his secretary, Mrs. Christianson. The reason I can't recall whether it was directly by Mr. Kolb—furnished directly by Mr. Kolb or Mrs. Christianson is because these copies of letters were made up by Mrs. Christianson and given to Mr. Kolb to hand to me when I would come into the office, or if Mr. Kolb wasn't there she was instructed to and did hand them to me.

Q. Were you furnished copies of similar letters by
801 Mrs. Kolb to other branch managers, The Glidden branches, requesting similar information?

A. Yes, I was furnished copies of all correspondence between Mr. Kolb and branch office personnel with respect to the investigation I endeavored to make.

Q. I show you a document marked Commission's Exhibit 774 and ask you to state what it is and what you know about its origin.

A. It is a copy of a letter dated July 6, 1945, from Mr. J. C. Sparks, of the San Francisco office, to Mr. Clifton M. Kolb of the Cleveland office, in answer to letter dated June 26, 1945, regarding certain information which we requested —or which was requested in the letter of June 26, 1945.

Q. And it was from such information—was it from such information as purports to have been transmitted by that document that entries were made in Commission's Exhibit 772-A to Z-31?

A. Yes. This letter was handed to me either by Mr. Kolb or by his secretary, Mrs. Christianson.

Q. I call your attention to the note in parentheses at the bottom of this sheet and ask you if that was on the bottom of the document when it came into your possession?

A. It was.

Mr. Wright: I offer Commission's Exhibits Nos. 773 and 774 into evidence.

Mr. Hinds: No objection. In fact, I think this
802 seems to confirm the pertinency of my objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification

(COMMISSION'S EXHIBITS Nos. 773 and 774 were received in evidence.)

Trial Examiner Norwood: Do you want to cross-examine him any further on that exhibit we received?

Mr. Hinds: Sir?

Trial Examiner Norwood: You can go into the contents of that exhibit, now.

Mr. Wright: Of this exhibit?

Trial Examiner Norwood: Of that last one we received there.

Mr. Hinds: I thought there would be cross-examination later of the witness.

Trial Examiner Norwood: That is right.

Mr. Hinds: But if you will permit me, you mean to extend my cross-examination in the light of these letters?

Trial Examiner Norwood: That is right. You can wait.

Mr. Hinds: I am willing to defer until he has finished.

By Mr. Wright:

Q. Turning again to Commission's Exhibit 772, is it my understanding of your testimony that the names of the 803 customers involved appears in the column to the left?

A. Yes.

Q. And the classification in the second column?

A. That is right.

Q. To what do the columns under the "shipping orders," "Number," and "Date Shipped" refer, the information appearing under there? We are referring now to Exhibit 772-B.

A. Under the column "Shipping Orders" is two columns, one headed "Number" and the other "Date Shipped". The "Number" column sets forth the number of the shipping order, and the "Date" column is the date that the order was shipped.

Q. The numbers under the shipping orders appear, then, from the original documents of The Glidden Company?

A. Yes.

Q. I notice under the column "Gross Weight" of white lead billed, "Rate" and "Amount." Were those figures entered by you?

A. No, those figures were entered by Mr. Glasser and Mr. Dignan, of the traffic department.

Q. I call your attention to the fact that on some of the

exhibits no freight rate applies—or there is no entry under the column on "Rate and amount of white lead billed." I will withdraw that question.

Trial Examiner Norwood: Strike it.

By Mr. Wright:

804 Q. I call your attention to Commission's Exhibit 772X and 772-Y, and ask you to state what you know about those documents?

A. These documents are both dated June 26, 1945. The document identified as 772-X is a statement made by David L. Glasser and Howard J. Dignan, to the effect that they did furnish and set forth on columnar sheets, originally identified as A through Q, and now identified as 772-B through 772-R. The other document—

Q. Will you complete that statement with reference to 772-X?

Mr. Hinds: Doesn't the document speak for itself? Is it necessary to read each one into the record again? It has been admitted in evidence, hasn't it?

Mr. Wright: I am perfectly willing to let the document stand for what it says on its face.

Trial Examiner Norwood: If there is any explanation you want to give about it you may do so, but I think the counsel's point is well taken.

Mr. Wright: I just want to—very well. I will withdraw the question.

I have no further examination with regard to the document.

Mr. Hinds: Are those in evidence, those two?

Mr. Wright: Yes, those are in evidence.

Trial Examiner Norwood: We will have a five-
805 minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Come to order, gentlemen.

Mr. Hinds: Did I understand you to say you were through with the direct examination, Mr. Wright?

Mr. Wright: Yes, sir.

Cross-Examination by Mr. Hinds.

Q. Mr. Reel, did you ask Glidden officials with respect to the date on which the price became determined as to each of these sales you have tabulated, or did you ask them merely for the invoices?

A. I asked them for the invoices, and also price lists for different periods.

Q. Did you discover in the course of your investigation that an order was received and accepted and the price becomes effective in many cases at a date other than the date of the invoices?

A. During this investigation no effort was made to check orders.

Q. So you cannot tell us one way or the other whether there is or not, or may or may not be a substantial difference in between the date when the price was determined between the buyer and the seller and the date when the goods are invoiced?

Mr. MacIntyre: I object to the use of the word
806 "substantial" in that question. It is too indefinite.

Mr. Hinds: Any that you would consider essential—

Mr. MacIntyre: Unless the witness specifies—

Trial Examiner Norwood: I think he can clarify that. The objection is overruled.

The Witness: Will you read the question, please?

(The Reporter read the last question.)

The Witness: Only with reference to the shipments made to distributors in conformity with the distributor agreements existing between the distributor and The Glidden Company.

By Mr. Hinds:

Q. Do you mean shipped on consignment to a consignee where the title remains in The Glidden Company? Is that the type you are referring to?

A. That is right.

Q. You don't regard that as a sale, do you, where The Glidden Company ships to its own consignee, retaining title?

Mr. MacIntyre: That is calling for a conclusion of the witness as to the nature of the transaction. It is obvious from the testimony he has given before that he does not have any knowledge.

Trial Examiner Norwood: Read the question, please.

(The Reporter read the last question.)

Trial Examiner Norwood: I think that is a matter
807 of argument.

Mr. Hinds: I want to find out what he is referring to.

Trial Examiner Norwood: The objection is sustained.

By Mr. Hinds:

Q. Do you regard those transactions, leaving open the question of whether they be sales, but have you regarded those as sales in making your tabulation?

A. Yes, I believe that shipments under a sales agreement are part of the sale.

Q. I am talking about the agreements that you have referred to where goods are shipped on consignment. Have you treated those as sales in your tabulation?

A. In the tabulation I have shown here are billings on goods sold by the distributor out of consigned stock and so reported to the company and billed accordingly.

Q. Are those earmarked so we can by examining the tabulation decide which is which?

A. Yes.

Q. All right.

A. They are marked BOSC stock, billed out of consigned stock.

Q. In each case where they have been billed out of consigned stock you have indicated it by those initial letters?

A. I have endeavored to do so.

Q. So far as you know, you have succeeded in that endeavor?

808 A. I have endeavored to do so.

Q. So far as you know, you have succeeded in that endeavor?

A. Yes.

Q. Let us take, for example, on page 9 at which we happen to be open, the sale to the Bennett Lumber Company, on line 2. The date of the invoice was November 6, 1941, the amount 500 pounds, and the price $10.25.

Then, let us take No. 5, which is Armstrong Hardware, invoiced only one day prior, November 5, 1941, where only 100 pounds was, to use your expression, sold, at $10.05.

Now, you have no means of telling on what date those prices were fixed between the buyer and the seller, or the shipper and the consignee, have you?

A. I would like to correct one thing that you stated—

Trial Examiner Norwood: Answer his question there, first.

The Witness: I can't without reference to the dates of the agreement, the distributor agreements.

By Mr. Hinds:

Q. Go ahead and satisfy your preliminary condition. Have you found it?

A. No. We have in this tabulation a list of distributor agreements which were made by Mr. Glauner.

Q. Were those described by you in your description of this tabulation before it was admitted in evidence?

809 A. No, but they were referred to.

Q. Referred to in what way?

A. As distinguishing between the invoice date and price and the date of the distributor agreement which goverened the price.

Q. Are there any other sheets in this tabulation which have not been described by you in your testimony prior to its admission in evidence, besides this one you have now turned to, page 19, SS2-T, listing so-called distributor agreements?

A. Yes, there are sheets in here which set forth the names of all the white lead customers of The Glidden Company to whom sales and shipments were made during the periods involved, so far as those names were furnished to me by the company.

Q. Have you now completed your description of what this tabulation consists of?

A. I believe so.

Q. I am not in any way suggesting it is anything but an inadvertence, but I assumed, in making my objection, that we had had it described.

You have now turned to 772-T. Do you find there the information which my earlier question calls for, namely, the dates when each of those two so-called sales became effective as to the determination of the price between the buyer and the seller?

A. On the sheet identified at 772-T under the left-
810 hand column designated "distributor" appears the name of Bennett Lumber Company, Medina, Ohio.

Q. Line 22?

A. Line 22. The date of the contract or distributor agreement is set forth in the second column as April 7, 1941, under which agreement the price of $9.75 is set forth in the third column governing sales of hundred-pound kegs of white lead; in the fourth column the price of $10 on sales of 50-pound kegs; and the fifth column the price of $10.25 for 25-pound kegs; in the sixth column the price of $10.50 for 12½-pound kegs.

Q. Now, can you tell us in what size kegs the merchandise referred to on page 772-J, namely, 500 pounds—can you tell us in what size kegs that was sold?

A. Of the complete white lead billed under that invoice of 737½ pounds, 500 pounds of that amount was white lead shipped in 100-pound kegs only at the price of $10.25, which price appears to be 50 cents higher than the price set forth in the distributor agreement.

Q. In other words, the distributor received 50 cents per 100 pounds for his services. Is that right? Is that the way you interpret that?

Mr. Wright: I object to that, Your Honor. That calls for an obvious conclusion of the witness.

Mr. Hinds: We are confronted here with a tabulation which on the face seems to charge us with discrimination. Perhaps we should not be allowed to defend ourselves at all against this charge, not by any means.

811

Trial Examiner Norwood: If he can give us any more information about that item, he may do so.

Mr. Hinds: I once heard a man say he wouldn't permit F. D. R. to be defended in his presence.

Mr. Wright: May we have the question read?

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

The Witness: I don't know. The only thing I can point out is the difference between the prices for which 100-pound kegs were to be sold under the distributor agreement between Glidden Company and Bennett Lumber Company and the actual price charged the Bennett Lumber Company under the invoice dated seven months later at $10.25 a hundred pounds, or 50 cents more.

By Mr. Hinds:

Q. The charge to whom, did you say?

A. The charge to Bennett Company.

Q. But they were not the purchasers of this merchandise, were they. They were the consignee. They were representing The Glidden Company.

A. They were the purchasers so far as the billing was concerned.

Q. Do you know who purchased those goods?

812

A. I have no reason to know, but I know the Bennett Company was charged with the goods by virtue of that invoice.

Q. Under the column of "class" Bennett Company is classified as a direct dealer.

A. That is right.

Q. Certainly he did function as a direct dealer in this instance. He functioned as a consignee—

Mr. MacIntyre: I object to the argument with the witness.

Mr. Hinds: This is not argument—

Mr. MacIntyre: May we have the statement read? It is a statement of argument by counsel.

Trial Examiner Norwood: I think he intends it as a question.

Read the statement.

(The reporter read the record.)

Mr. MacIntyre: The witness has already testified that the classification appearing in the tabulation were supplied by The Glidden Company.

Trial Examiner Norwood: I will sustain the objection and let counsel reframe the question.

Mr. Hinds: I am not trying to trick the witness. I am just trying to get the facts.

By Mr. Hinds:

Q. You have opposite this company the classifica-
813 tion "Direct Dealer," have you not? You also have after that ditto marks coming down from line, which are what?

A. Bosc stk.

Q. That means what?

A. Billing on shipments of consigned stock.

Q. You say this was by virtue of an agreement which this company, Bennett Lumber Company, has been classified as a direct dealer, the goods in question had been consigned—not sold but consigned—to Bennett Company, and that this represented the consignee's accounting or accountability for 500 pounds of Glidden's material? Is that the way you interpret that?

A. That is right.

Q. You say this was by virtue of an agreement which you find on page 772-T which had been entered into the previous April, this being November. Is that right?

A. I did not intend to say the shipment was by virtue of an agreement. I intended to show that this invoice covered a sale of this material—could I withdraw that answer?

Trial Examiner Norwood: You tabulated that as a sale, did you not, when it was covered by invoice?

The Witness: This was tabulated as a sale with the

qualification showing that the sale was not a shipment but merely a billing on the consigned stock set-up.

Mr. MacIntyre: May we go off the record?

814 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Hinds:

Q. About how many sales, or what you call sales, would you say are listed in this total tabular exhibit? Would you say a thousand or 2,500?

A. In the whole thing?

Q. Yes.

A. I wouldn't have any idea.

Q. Well, there are pages 1 to 40 of some sort of tabular material, aren't there?

A. About 1,600.

Q. And on some of the pages there are at least 40 items?

A. Yes.

Q. So it would be in the nature of four digits, over a thousand?

A. Yes.

Q. It seems that having selected a consignment transaction we have been unfortunate in not getting anywhere. Can you take any other pair which were not consignment but cases where The Glidden Company on approximately the same date of shipment itself made sales—I don't mean to a consignee—at prices to the same class of customer which are not exactly the same per hundred pounds, so that we may use those as an example in saying where the

815 price was fixed, what date?

A. These tabulations speak for themselves as to origin and as to other information contained therein. The other is merely a mechanical job which I don't think I can do any better than you.

Q. In other words—

Mr. MacIntyre: Your Honor, we will concede, in order to save time, that you cannot determine from this tabulation the precise date on which each of these transactions originated.

We contend that it does show the date on which the billing, the invoicing, and the shipment took place.

Now, we invite The Glidden Company to furnish us the information as to the precise dates on which each transaction arose, if they have the information. We have not

been able to get it. If they think it is material we invite them to give it to us and we will have you and the Commission consider it, in so far as you think it is applicable, along with this tabulation.

Trial Examiner Norwood: I think counsel has certainly clarified the matter of just what is the basis of his entries there.

Mr. Hinds: Let us be frank: Are we expected to assume the burden of justifying, not only under the statute as we are obliged to—we have to assume differences in
816 price on a given date with respect to delivery, and so forth—but are we expected to take the burden of assuming the dates are different when, from your information, it would appear the dates are the same? Are we to take that burden of proof on over 1,000 items?

Mr. MacIntyre: We contend if the price cards we have showing the price periods on the dates of the changes along with this information, we have a sufficient amount of information from which conclusions can be drawn—and properly and fairly so—as to price discriminations involved, without the precise dates of each transaction being determined from this tabulation.

But again, if Glidden Company thinks that is necessary we invite them to bring it forward.

Mr. Hinds: We are trying to find out what they claim.

Trial Examiner Norwood: Let us not discuss the burden of proof here. Counsel can examine the witness here and get all the facts about these calculations and entries. Let us confine ourselves to that for the time being.

By Mr. Hinds:

Q. Have you in your possession here in Washington any information as to any one of these sales, as to the date when the price was arrived at between the buyer and seller?

A. No, not that I know of.

817 Q. And have you any information as to the range of possible time differences between the dates that you have furnished us, namely, invoice or shipment date, on the one hand, and the date when the price was arrived at between the buyer and the seller?

A. No, not that I know of.

Q. So far as you know, it may have been as much as a year?

A. As far as I know.

Q. Or it may have been as little as five minutes?

A. That is true.

Q. Did any Glidden official ever tell you that all of their sales are made on a published price list?

Mr. MacIntyre: I object because it is already a matter of record that all are not made—the word "all" means 100 per cent, and we concede that there are exceptions.

Mr. Hinds: I wish Your Honor would listen to my question and not objection.

Trial Examiner Norwood: Read it.

(The reporter read the last question.)

The Witness: No.

By Mr. Hinds:

Q. So that it is not a fact, is it, on the basis of your information that one can make a comparison of two sales, that prices were arrived at on a given date, getting the date from the tabulation of yours, the date of invoice 818 or shipment, and then consulting an invoice or price list?

Mr. MacIntyre: I object to that. It calls for a conclusion as to what can be done or cannot be done from the information here.

Trial Examiner Norwood: I think it is mostly argument.

Mr. Hinds: I am making an objection tenable on its face, that we are not furnished any dates. Counsel then says "That is true. These dates have no relevancy in our tabulation, but we have price lists."

Then I ask the witness if he has any information as to whether the sales are necessarily according to the price list, and he says, "No," so we are where we started.

By Mr. Hinds:

Q. Do you know where the information can be obtained, or is there any information in your possession as to the dates prices were arrived at between the buyer and the seller, except by going back to Cleveland and taking every one of these thousand or more cases and digging it out from the records?

A. I answered that.

Trial Examiner Norwood: I think he answered that two or three times.

Mr. Hinds: That is all.

I renew my motion, now, to strike this out. It seems
819 to me this cross-examination has demonstrated that my original objection was not purely technical, that there is a very important lack here when you don't furnish the dates when the prices were agreed upon.

The witness says it may have been a year or a minute. Unless it be a fact in a case under the Robinson-Patman Act, the respondent has not only to justify apparent differences on different dates, but he has to take cases with one date and show that they are on different dates, we are confronted with no date at all and we have to show the dates of the two contrasting transactions.

Trial Examiner Norwood: Motion denied.

Proceed with the further examination.

Mr. Hinds: No further examination.

Mr. Wright: We have no further questions of this witness.

Mr. MacIntyre: Your Honor, before the witness is discharged, however, and while Mr. Hinds is present, I would like to make this request on the record, and I want it to be considered as a notice to produce: That as soon as we furnish Mr. Hinds with a photostat of this Exhibit 772, he undertake on behalf of The Glidden Company to secure from that company for us, and to produce at hearings in this case, the list of the dates on which each of the transactions that are listed in Exhibit 772 arose, listing
820 beside each of the dates the invoice numbers and the billing numbers that are listed in this exhibit.

Mr. Hinds: While I don't pretend to carry in my head the bookkeeping or recording practices of Glidden Company, I think I can state confidently there is no such record of The Glidden Company.

The Glidden Company does not maintain its records in that way. In order to get this information, if it be pertinent, you would have to dig out each of these transactions and make a research to find out what the date of the arriving at the price was.

Of course, the law does not place any such burden on us.

Trial Examiner Norwood: Counsel merely wanted to put this request on the record.

Mr. Hinds: If it did, the law would be unconstitutional, it being oppressive. Fortunately there is no such legal requirement.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: I refuse to accept such notice to produce, as being an illegal notice. The law does not entitle the Commission to demand the preparation of lists from the respondent's records by the respondents. The law permits them, so long as they are not oppressive, to demand
821 by the proper means—by subpoena, I believe—production of existing records, which we will comply with if served with it.

I am informed, although this is not official, that never has there been such a record as I am asked to produce, which would have to be prepared very laboriously, but the original data from which it could be prepared is not in existence.

Trial Examiner Norwood: Are the invoices the best evidence of what the practices were?

Mr. Hinds: The invoices are certainly the best evidence of what the prices were, but they contain no information whatsoever as to what the dates were.

Mr. MacIntyre: Your Honor, in further response to the reaction stated by Mr. Hinds, I want to state it is our information, and this is on the basis of information we secured from The Glidden Company, that the date of the order placed by each of its customers is entered on the invoices.

The invoices in these instances from which this tabulation 772 was made up were not submitted to us because they were invoices of much material in addition to lead, and officials of the Lead Company took from those invoices certain items involved in this tabulation and furnished them to us on invoice forms which did not carry all the information on the invoice itself in each instance.

We, therefore, believe that if the company cares to
822 check back in following through and complying with the notice to produce which has been made, that they will be able to get such information from their invoices and supply it to us, or supply us with the original invoices and we will make the list up.

Mr. Hinds: I haven't any doubt that we would comply with a demand to supply any documents in our possession, and I doubt that we would raise the question that the demand was oppressive, even if it were, but I don't think

we are obliged to do any research or prepare any tabulation.

I have no recollection whether it is true or not, but I am inclined to take whatever Mr. MacIntyre says as true, but if it be true that these dates of order, which I think would have some relevance—they might not be conclusive—but I think we would have to say if they were there that that creates a presumption as to the date of sale.

If those were on the invoices and not tabulated, it was because we were not requested to do so. We gave them whatever they wanted and if we had not I am sure we would have heard very strenuously from them.

Trial Examiner Norwood: I am sure counsel will get that information if he can.

Mr. Wright: Your Honor, we had intended at this time to take up some of the matters of Sherwin-Williams Company. I am advised by one of the counsel for Sherwin-
823 Williams Company. I am advised by one of the counsel for Sherwin-Williams Company that he has an appointment this afternoon and wants to get away, and would like to delay the matter until tomorrow morning.

Trial Examiner Norwood: Will 10 o'clock suit you?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 4:08 o'clock p. m., the hearing was adjourned until Thursday, June 20, 1946, at 10 o'clock a. m.)

824

Room 532, Federal Trade Commission Building, Washington, D. C., June 20, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), and

T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chandbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

825 Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), and

Richard Serviss, Esq. (1100 American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq.,

W. R. McDermott, Esq., and

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

826 PROCEEDINGS.

Trial Examiner Norwood: Come to order, gentlemen.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened at 10 o'clock a. m., on the 20th day of June, 1946, the location having been changed to the main hearing room, No. 532 of the offices of the Federal Trade Commission, due notice having been given to the parties.

Call your next witness.

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 654, which is a list of warehouses of the Sherwin-Williams Company identified at page 276 of the record.

Trial Examiner Norwood: Was Mr. Reel discharged yesterday?

Mr. Wright: Yes, he was, sir.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 654 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence

Commission's Exhibit 652-A to L, for identification, which is identified at page 276 of the transcript as a roster of retail stores of the Sherwin-Williams Company as of June 1, 1943.

Mr. Welch: With reference to Commission's Ex-
827 hibit 652-A to L, inclusive, we have no objection to the authenticify of the document as correctly stating the roster of the retail stores, but we do object to the offer in evidence for the reason that the location of the retail stores of this respondent is not material to this case in our view.

Trial Examiner Norwood: Is there any further objection?

(No response.)

Trial Examiner Norwood: The objection is overruled. Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 652-A, 652-B, 652-C, 652-D, 652-E, 652-F, 652-G, 652-H, 652-I, 652-J, 652-K, and 652-L were received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit, for identification, 653, which is identified at page 276 of the transcript, showing divisions of the Sherwin-Williams Company in the north central territory.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document marked for identification COMMISSION'S EXHIBIT NO. 653 was received in evidence.)

Trial Examiner Norwood: With respect to the retail stores, I assume counsel is going to connect this up.
828 Is there some reason why he wants to put in the location of the retail stores?

Mr. Wright: Your Honor, I submit it is connected now. I am sure it will be connected before the record is closed because it is our contention that the Sherwin-Williams Company markets their lead pigments, as alleged in this complaint, through its retail stores in accordance with the system, in part at least, as alleged in the complaint.

Trial Examiner Norwood: You are going to show something concerning these stores?

Mr. Wright: Yes.

Trial Examiner Norwood: Received.

Mr. Welch: Received subject to connection, or without?

Trial Examiner Norwood: It is all subject to connection.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit, for identification, 504-A and B, which is identified at page 316 of the transcript, which shows delivered price differentials at various geographic locations of the Sherwin-Williams Company in the sale of lead pigments, under date of May 21, 1942.

Mr. Welch: Objection is made to Commission's Exhibit 594-A solely on the ground that it is a duplication of Commission's Exhibit 662-S, for identification, and I see
829 no point in duplicating these.

Mr. Wright: Your Honor, I submit that at any rate Commission's Exhibit 662-S, for identification, has not yet been offered into evidence, but, furthermore, the identification of 594-A and B distinguishes it from the identification of 662-S.

Mr. Welch: You mean distinguishes them as different documents?

Mr MacIntyre: As to the significance of the documents, the difference is set forth in connection with the record identification of the two.

Mr. Welch: In that event I want to look at the record. What is the page?

Mr. MacIntyre: 316.

May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Is there any further objection?

(No response.)

Trial Examiner Norwood: Received as marked. The objection is overruled.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 594-A and 594-B was received in evidence.)

830 Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit, for identification, 662-A through Z-26, identified in the transcript at pages 276 to 280 as statements by the Sherwin-Williams Company of their price quotations and terms and conditions of sale at various times.

Mr. Welch: Counsel for the respondent, of course, do not agree with the characterization of the documents. These

documents were the subject of the stipulation entered into between counsel for the Commission and counsel for the respondent Sherwin-Williams Company, and read upon the record, and those documents are there described, and we do not subscribe to any description other than that.

We have no objection to any of the documents except Commission's Exhibit 662-S and T, which is a duplicate copy of Commission's Exhibit 594-A and B, which was just immediately preceding received in evidence. It is pure duplication, and nothing else.

Trial Examiner Norwood: Was that signed in the same place?

Mr. Welch: Both obtained from Sherwin-Williams Company.

Mr. MacIntyre: But from different people and under different circumstances, and there is a factual showing in the record that distinguishes them.

Trial Examiner Norwood: Is it these titles that you
831 object to?

Mr. Welch: No; the titles are in a statement that appears on the document, itself. I merely object to counsel's characterization.

Trial Examiner Norwood: These exhibits are received as marked, and not necessarily as described.

(The documents referred to were marked for identification COMMISSION'S EXHIBITS NOS. 662-A, 662-B, 662-C, 662-D, 662-E, 662-F, 662-G, 662-H, 662-I, 662-J, 662-K, 662-L, 662-M, 662-N, 662-O, 662-P, 662-Q, 662-R, 662-S, 662-T, 662-U, 662-V, 662-W, 662-X, 662-Y, 662-Z, 662-Z-1, 662-Z-2, 662-Z-3, 662-Z-4, 662-Z-5, 662-Z-6, 662-Z-7, 662-Z-8, 662-Z-9, 662-Z-10, 662-Z-11, 662-Z-12, 662-Z-13, 662-Z-14, 662-Z-15, 662-Z-16, 662-Z-17, 662-Z-18, 662-Z-19, 662-Z-20, 662-Z-21, 662-Z-22, 662-Z-23, 662-Z-24, 662-Z-25, 662-Z-26 and received in evidence.)

Mr. Welch: I do object to the duplication as indicated by 662-S and T, which is a photostatic copy of 594-A and B. They are identically the same document.

Trial Examiner Norwood: I will overrule that and receive it. Counsel has stated some reasons for it. I might strike it later if there is any reason for doing so.

Mr. Wright: Your Honor, I wish to offer Commis-
832 sion's Exhibit, for identification, 723, identified at page 336 of the transcript, which is a statement by the Sherwin-Williams Company of certain freight rates involved in the shipment of lead pigments.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 723 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence as Exhibit, for identification, 726, identified at page 337 of the record, which is a statement by Sherwin-Williams Company as to certain freight rates applicable to certain shipments of white lead.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 726 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 727, identified at page 337 of the transcript, as a statement of certain freight rates applicable on white lead-in-oil by the Sherwin-Williams Company.

Mr. Welch: As to Commission's Exhibits Nos. 723, 726, and 727, those three as a group, we have no objection,
833 but we do not concede that the information thereon stated as to freight rates is necessarily correct. It was information furnished by our employees, and may or may not be correct.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 727 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer into evidence Commission's Exhibits 724 and 725, identified at pages 336 and 337 of the record as statements of freight rates by the Sherwin-Williams Company as applicable to white lead.

Mr. Welch: Sherwin-Williams Company does not deny that Commission's Exhibits 724 and 725 were written by its employees, but does not concede that the statements therein are necessarily correct as to the applicable rates.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 724 and 725 were received in evidence.)

Mr. Wright: I would like now to ask that certain documents be marked for identification.

May we take a five-minute recess while these are marked?

Trial Examiner Norwood: We will have a short recess.

(There was a short recess taken.)

834 (The documents referred to were marked for identification Commission's Exhibits Nos. 775-A, 775-B, 776-A, 776-B, 776-C, 776-D, 776-E, 776-F, 776-G, 776-H, 776-I, 776-J, 776-K, 776-L, 776-M, 776-N, 777, 778-A, 778-B, 779-A, 779-B, 779-C, 779-D, 780-A, 780-B, 781-A, 781-B, 781-C, 782-A, 782-B, 782-C, 782-D, 782-E, 782-F, 783, 784-A, 784-B, 784-C, 784-D, 784-E, 784-F, 785, 786, 787, 788, 789, 790, 791-A, 791-B, 791-C, 791-D, 791-E, 791-F, 791-G, 791-H, 791-I, 791-J, 792-A, 792-B, 792-C, 792-D, and 793.)

Trial Examiner Norwood: Proceed, gentlemen.

Mr. Wright: I would like to recall Mr. Reel.

DAVID R. REEL was thereupon called as a witness for the Federal Trade Commission, and, having been previously sworn, testified further as follows:

Mr. Wright: Your Honor, this witness has previously been sworn, and I believe his background is already in the record. He is now recalled as a Commission witness.

Trial Examiner Norwood: Very well.

Direct Examination by Mr. Wright.

Q. Mr. Reel, have you recently had occasion to make investigation of the Sherwin-Williams Company?

835 A. Yes, about a year ago.

Q. In connection with your investigation, did you examine the records of sales and distribution of lead pigments by the Sherwin-Williams Company?

A. I did.

Q. Did you consult with responsible officials of the Sherwin-Williams Company in connection with that investigation?

A. I did.

Q. Do you recall the names of the officials with whom you consulted, and their position with Sherwin-Williams?

A. The officials with whom I consulted and who furnished to me the information and exhibits I received were Mr. Thomas McDowell, house counsel, and Mr. James E. Campbell.

Q. Will you describe, briefly, the type of investigation you made of the records of Sherwin-Williams Company?

A. The Sherwin-Williams Company have a main office in Cleveland, Ohio, and eight other divisional offices.

All the records of the divisional offices are located in separate locations. The only records of the company available to me originally were those dealing with the business of the Cleveland division, known as the North Central Division.

Mr. McDowell and I prepared a letter, a copy of which was forwarded to each of the separate branch or divisional offices, requesting copies of their invoices showing the
836 sale and delivery of white lead, with separate requests in this letter asking for classification of customers and freight information pertaining to those shipments of white lead as shown on the house copies or invoices which we requested to be furnished to us.

Originally, we had asked to have them choose two customers of the same class in certain selected cities throughout the United States.

Shortly after the first letter was sent out we found that it was necessary to request that all invoices, or house copies, showing the sale and shipment of white lead be taken from the files of the divisional offices and sent to us as the white lead sales of the Sherwin-Williams Company were very insignificant as far as their total sales of other merchandise were concerned, and it was found also that very few sales of white lead were made by the company in these selected towns or cities in the various cases, so that a general over-all picture of the company could be drawn.

Q. In the course of your investigation, which you described, did you receive papers and documents and records from officials of the Sherwin-Williams Company?

A. Yes.

Q. I hand you herewith Commission's Exhibit, for identification 775-A and B, and ask you to state what it is.

A. This is a special circular letter, No. 1809, dated
837 June 20, 1945, setting forth a roster of stock papers and addresses of offices, factories, and warehouses, consisting of two pages, which document was furnished to me by Mr. McDowell on July 18, 1945.

Q. Was any representation made to you as to what sort of record that is?

Mr. Welch: Objection.

Trial Examiner Norwood: Objection overruled.

The Witness: Yes. It was in response to a request made by me for such information.

Mr. Wright: Your Honor, I offer Commission's Exhibit 775-A and B in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 775-A and 775-B was received in evidence.)

By Mr. Wright:

Q. I hand you a document marked Commission's Exhibit, for identification, 776-A to N, and ask you to state what it is.

A. This is a document setting forth the roster of retail stores, dated October 1, 1944, which was furnished to me by Mr. McDowell at my request for the information contained therein, on July 18, 1945.

It should be also noted that the additions and inter-
838 lineations appearing on the pages of this document appeared thereon at the time it was furnished to me by Mr. McDowell.

Mr. Wright: Your Honor, I offer Commission's Exhibit 776-A to N in evidence.

Mr. Welch: Counsel for the respondent do not deny, but admit, the authenticity of the list as showing the retail stores, but do object to the introduction and reception of the document for the reason that it is not relevant or competent to the issues involved.

Trial Examiner Norwood: Received as marked.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 776-A, 776-B, 776-C, 776-D, 776-E, 776-F, 776-G, 776-H, 776-I, 776-J, 776-K, 776-L, 776-M, and 776-N were received in evidence.)

By Mr. Wright:

Q. I hand you herewith a document marked for identification as Commission's Exhibit No. 777, and ask you to state what it is.

A. This is a pamphlet of the Sherwin-Williams Company describing its product known as Zilo, which was furnished to me by Mr. McDowell on July 18, 1945, upon specific request for information regarding this product.

839 Mr. Wright: Your Honor, I offer Commission's Exhibit No. 777, for identification, in evidence.

Mr. Welch: Counsel for Sherwin-Williams does not deny that the document identified as Commission's Exhibit 777 was issued by it, but takes the position that it deals with a product known as Zilo, not with one of the products involved in this proceeding, and objects on the ground of immateriality.

Mr. Wright: Your Honor, in that connection I would like to observe that the name of the product Zilo appears in the exhibit which have already been entered into evidence, price lists and quotations of the Sherwin-Williams Company, with no other description.

The pending exhibit shows that Zilo is composed of 75 per cent lead pigments, and it is offered for the purpose of tying the product Zilo into the allegations of the complaint.

Trial Examiner Norwood: You contend this was sold by the same methods as the other?

Mr. Wright: It appears on the face of documents which have been introduced that it is sold on the same basis.

Mr. Welch: There is no allegation in the complaint dealing with this product.

Mr. Wright: The complaint covers lead pigments and sets forth red sulphate and lead basic carbonate, and it is composed of 75 per cent of lead and lead basic carbonate.

Trial Examiner Norwood: It is an allied product, and the method of sale is involved.

840 It is received as marked. Counsel has his exception.

(The document heretofore marked for identification COMMISSION'S EXHIBIT 777 was received in evidence.)

By Mr. Wright:

Q. I show you documents marked Commission's Exhibit 77-A and B, and ask you to state what they are.

A. The two pages of this exhibit are photostatic copies of both sides of a pamphlet issued by Sherwin-Williams Company with respect to white lead and Zilo, and sets forth price lists to various customers of these products.

The pamphlet is dated April 25, 1941, and designates the town Dallas, Texas.

These were supplied to me by Mr. McDowell on August 9, 1943, in response to my request for such information.

Q. Was any representation made to you as to any geographic territory in which the prices set forth in that exhibit were applicable by the Sherwin-Williams Company?

Mr. Welch: Objection. The document speaks for itself.

Mr. Wright: Your Honor, I asked for a separate representation rather than a document.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

841 Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Anything outside of the paper—the paper makes its own representations—but were any statements made to you by the person who gave you this letter?

A. This document was furnished to me by Mr. McDowell in response to my request for price lists used and applicable in the Dallas, Texas, area.

Mr. Wright: Your Honor, I offer Commission's Exhibit 778-A and B into evidence.

Mr. Welch: No objection, Your Honor.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 778-A and 778-B were received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked for identification Commission's Exhibit 779-A to C, and ask you to state what they are, if you know?

A. These documents represent bulletin No. 177, dated April 25, 1941; bulletin No. 37, dated May 21, 1942, and represent prices quoted on the sale of white lead and other pigments by the Sherwin-Williams Company to various classes of customers, and was furnished to me by Mr. McDowell on August 9, 1945. This document contains certain—

842 Q. May I ask you in that connection—I believe I referred to it as Commission's Exhibit 779-A to C—is your statement with regard to 779-A to C also refer to 779-D?

A. Yes.

Q. Were the handwritten notations which appear upon this exhibit, on the exhibit when it was furnished you?

A. Yes, and the notation at the bottom of these exhibits shown as "Dallas" is in my handwriting, and discloses

that they were received with other material sent to the Cleveland office by the Dallas office of the Sherwin-Williams Company.

Mr. Wright: Your Honor, I offer Commission's Exhibit 779-A to D in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 779-A, 779-B, 779-C, and 779-D were received in evidence.)

By Mr. Wright:

Q. I hand you herewith Commission's Exhibit 780-A and B, and ask you to state what it is, if you know?

A. This document, consisting of two pages, represents prices on price lead to the various classes of customers of the Sherwin-Williams Company, applicable to the eastern price zone, for the period from April, 1941, to June 27, 1942, and for a period May 21, 1942, to May 17, 1943.

843 These documents were furnished to me by Mr. McDowell on August 9, 1945, in response to my request for such information.

Q. I call your attention to the handwriting showing "Chicago" on the first page of Exhibit 780-A. Was that on the exhibit when received by you?

A. The word "Chicago" is in my handwriting, and was placed thereon at the time these papers were handed to me with other information on exhibits received from the Chicago office of the Sherwin-Williams Company.

Mr. Wright: I offer Commission's Exhibit 780-A and B in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 780-A and 780-B were received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked for identification Commission's Exhibit 781-A through C, and ask you to state what they are, if you know.

A. This document discloses the prices on white lead and other pigments, including the product known as Zilo, effective January 26, 1942, and was furnished to the wit-

ness by Mr. McDowell on August 9, 1945, in response
844 to a request for such information made by the witness.

The word "Portland" appearing on the bottom of each of these separate pages is in my handwriting, and discloses that these papers were furnished to me with other information received by Mr. McDowell from the Portland office of the Sherwin-Williams Company.

Q. I call your attention to the figure "1" in a circle, handwritten at the lower righthand corner of 781-A, and the figure "2" in a circle, handwritten, at the lower righthand corner of Exhibit 781-B, and the figure "3" handwritten in a circle at the lower righthand corner of Exhibit 781-C, and ask you to state whether those marks were on the exhibits when they were received by you?

A. I do not recall. The marks are photostated, and these papers were sent to us as photostatic copies of the originals.

Q. I call your attention to the fact that on Commission's Exhibit 781-A there is a quotation under "D," "Less than 500 pounds, $12.25," and on 781-B, the quotation "Less than 500 pounds, $12.50," and on 781-C, the quotation "Less than 500 pounds, $12.75."

Was any representation made to you by any official of Sherwin-Williams Company as to the distinction between those listings?

A. No discussion that I can recall was had regarding those prices.

845 Mr. Wright: Your Honor, I offer Commission's Exhibit 781-A through C into evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 781-A, 781-B, and 781-C, were received in evidence.)

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 782-A through F, for identification, and ask you to state what those documents are, if you know.

A. These documents are known as bulletin No. 3, bulletin No. 4, bulletin No. 5, and bulletin No. 6 of the Sherwin-Williams Company, and set forth prices on white lead and other pigments to various classes of customers of Sherwin-Williams Company.

Q. Was any representation made to you as to any geo-

graphic area regarding which the information appearing on those documents is applicable?

Mr. Welch: Objection. The documents speak for themselves as to the territory covered.

Mr. Wright: Your Honor, I submit the question related to a separate representation rather than the document itself.

Trial Examiner Norwood: If he said anything out-
846 side the papers he can tell us that.

The objection is overruled.

The Witness: These documents were handed to me as coming from the Portland office of the Sherwin-Williams Company, with other material requested of that office.

By Mr. Wright:

Q. Is that Portland, Ore., or Portland, Me.

A. Portland, Ore. It was furnished to me by Mr. McDowell on August 9, 1945, upon my request for such information.

This document also sets forth the various zones established by the Sherwin-Williams Company in the western section of the United States.

Mr. Wright: I offer Commission's Exhibit 782-A through F in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 782-A, 782-B, 782-C, 782-D, 782-E, and 782-F were received in evidence.)

By Mr. Wright:

Q. I hand you a document marked Commission's Exhibit 783, for identification, and ask you to state what it is.

A. This document sets forth the ocean rates from June 3, 1940, to January 7, 1942, and was furnished me by Mr.
McDowell on August 9, 1945. The document was sup-
847 plied by Mr. McDowell with other information and exhibits sent to him by the Portland, Ore., office of the Sherwin-Williams Company.

Mr. Wright: Your Honor, I offer Commission's Exhibit 783 into evidence.

Mr. Welch: No objection on the basis that Commission's Exhibit 783 is a document which was furnished by employees of Sherwin-Williams Company, but no concession is

made that that is a correct representation of what the facts might have been.

Trial Examiner Norwood: Is that more than one sheet?

Mr. Wright: No, sir.

The Witness: Just one sheet.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 783 was received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked Commission's Exhibit 784-A through F, and ask you to state, if you know, what they are?

A. These documents set forth prices on white lead and other pigments, as well as other products of the Sherwin-Williams Company, effective at various times, and were furnished to me by Mr. McDowell on August 9, 1945.
848 The documents were included with other information and exhibits furnished to me from—by the Oakland, Calif., office of the Sherwin-Williams Company, and the word "Oakland" appears in my handwriting at the bottom of each of these sheets.

Q. I call your attention to the notations appearing on Commission's Exhibit 784-B in hand at the bottom of the sheet and to the left of the classification of packages, and ask if those notations were on the document when it was furnished you?

A. Yes.

Q. I call your attention to similar notations appearing on 784-D and ask if they were likewise on the document when it was received by you?

A. They were.

Q. I call your attention to the large handwritten crosses on several of the exhibits, and ask if they were on the documents when they were handed to you?

A. Yes.

Q. I call your attention to the handwritten note on the bottom of Commission's Exhibit 784-F, and ask if that was on the document when it was handed you?

A. That was.

Mr. Wright: Your Honor, I offer Commission's Exhibit 784-A to F into evidence.

Mr. Welch: Objection is made to the reception of

849 Commission's Exhibit 784-A, which, according to its own face, deals with linseed oil, neatsfoot oil, pine tar, and turpentine.

According to my understanding, none of those products are involved in this proceeding.

The same is true so far as Commission's Exhibit 784-C is concerned, linseed oil, neatsfoot oil, pine tar, and turpentine. The same is true so far as Commission's Exhibit 784-E is concerned.

Mr. Wright: Your Honor, counsel is willing to concede that several of the sheets that are part of this exhibit do relate to products which are not within the terms of the complaint, but the whole exhibit is taken from the price record of the company which was furnished, and I see no reason for not allowing it in in its entirety.

Mr. Ewing: Well, I will join in Mr. Welch's objection, Your Honor. It seems to me that those products are entirely outside of this proceeding, and are not in any way involved in the charges, and are wholly irrelevant.

Trial Examiner Norwood: Well, are they in this same line of trade?

Mr. Wright: They are part of the general line of painters' material.

Mr. Welch: They are not competitive products in any sense of the word with the products involved. They 850 are products sold by the company.

Mr. Ewing: Your Honor, we start off in the complaint with lead pigments, and now it seems to me to encumber the record with respect to information as to other products that are in no way involved in the proceeding is wholly unnecessary.

Trial Examiner Norwood: Well, if it is in the same line of trade, and they are allied products, and were sold—it is shown here that they were sold by the same methods, the same pricing methods, do you make any charge as to the way they price this oil and allied products?

Mr. Wright: No, sir; we haven't.

Mr. Ewing: They make no charge with respect to—

Mr. MacIntyre: If Your Honor please, there is a charge in the complaint that National Lead Company, as set forth in paragraph 7 of count 1 of the complaint, embarked upon a plan and program to secure a monopoly control over the prices of these lead pigments.

Now, the counsel for the Commission stand ready to

show that in connection with that plan and program it moved to secure control over the products with which especially white lead and red lead were sold to the ultimate consumer, namely, linseed oil and turpentine, and went so far in that direction as to gain a substantial control through stockholders' interests into the American Linseed Oil
851 Trust, which controlled practically all the output of that product in the United States.

Mr. Welch: Which has nothing to do, of course, with Sherwin-Williams' sale of those products.

Mr. MacIntyre: No, but Sherwin-Williams assisted National Lead, maybe unwittingly, maybe not, in securing that monopoly control.

Mr. Ewing: I submit, Your Honor, that the complaint cannot be broadened by counsel's statements, and the fact of the matter is that there was reference in the complaint to linseed oil, and that was taken out in the amended complaint, and to say that neatsfoot oil or that turpentine has anything to do with the lead pigment situation involved in this case is perfectly preposterous, as I see it. If he is trying these other issues relating to these other pigments, they ought to be in the complaint, and to take the broad, general allegation which charges us with an attempt to monopolize lead pigments, and to say that that justifies the encumbering of the record with price information of Sherwin-Williams Company, and other companies relating to products that they disposed of, is no evidence that we did. I think it is going entirely too far.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: The only thing I see in the amended complaint is just a little matter of description
852 thrown in here as to Bass-Huerter Paint Company being the second largest manufacturer of linseed paints and varnishes on the Pacific Coast, or something like that.

Mr. MacIntyre: But, if Your Honor please, before this record is closed counsel for the Commission will undertake to show you that the market for these lead pigments is affected in no small way by the market conditions which have been established on linseed oil and turpentine, and for which National Lead, the principal respondent here, is in no small way responsible.

Mr. Ewing: There is no such—

Trial Examiner Norwood: Wait a minute. One at a time.

Mr. MacIntyre: We are also prepared to, and will undertake to put into the record evidence that National, and as further supported by the other respondents here, have undertaken to establish for the sale of lead pigments pricing practices and methods such as those alleged in the complaint which they thought would be carrying out the intents and purposes and effects of the pricing practices established by the linseed oil people for the sale of linseed oil.

Mr. Ewing: I return to the point, Your Honor, that linseed oil is not in the complaint. It has been my understanding always—this may be wrong—that the pleadings determine the scope of the case, and if we are trying
853 this case on the pleadings I submit this testimony is wholly irrelevant. If we are trying it on what Mr. MacIntyre says the issues are, outside of the complaint, that is something else, but it seems to me to encumber the record under the present state of the proceedings is something wholly outside.

Mr. Wood: I would like to say, just on behalf of Eagle-Picher, that if we are going into the linseed oil industry I certainly would like to know it so that I can prepare properly in the case, and so that my client can be prepared properly in the case.

Mr. Wright: Your Honor, counsel is willing to withdraw those exhibits which refer only to linseed oil and neatsfoot oil. May I segregate them so that I can make a re-offer of the exhibits?

Mr. Wood: I think in spite of the withdrawal we should have just a little bit of light on the scope of the issues in this case.

Trial Examiner Norwood: Well, I must confess that I will have to study the complaint a little. It is pretty broad, but the complaint charges a method, and—

Mr. MacIntyre: If Your Honor please, we are concerned—

Trial Examiner Norwood: —and these allied things that are sold along with it and inseparable from the pigment business may be shown to be—linseed oil—may be
854 shown to be an inseparable ingredient to paint, and if you show that it was sold along with the paint by the same method evidence could be received, I think, to show the method.

Mr. Ewing: From that view, Your Honor, I submit we

are helpless. We don't know from day to day what counsel for the Commission is going to introduce, and at his whim he can present documents to you, or offer them in evidence, and suggest, without a single supporting allegation in the complaint, that they should be received simply because on his statement they are connected with the pricing business. We can't possibly protect ourselves or prepare for trial.

Mr. Wright: Your Honor—

Trial Examiner Norwood: We are not going to do anything by whim here. There must be a good reason for everything.

Mr. Ewing: I submit that—

Trial Examiner Norwood: I attempted to state a reason there why I received a couple of letters here with respect to the sale of paint. I think we are perfectly correct; it is a very familiar rule of evidence; that it can be received to show a general plan or method.

Mr. Ewing: The charges are not that National Lead is selling linseed oil or turpentine in accordance with a general plan. The charges are that we are selling lead pigments in accordance with a general plan.

855 Mr. MacIntyre: We are not charging that, and, furthermore, we are not intending to prove all of that except in so far as it will go so far as the sale or purpose on some of these pigments.

Trial Examiner Norwood: And to the question of throwing some light on the way respondents sell the lead pigments. If there is no reasonable connection here it will not be received. We are not going to do anything arbitrary or capricious.

Mr. Ewing: Oh, I understand that, but I just want to make our position perfectly clear, that if we are defending a case involving neatsfoot oil, linseed oil, turpentine, I want to know it now.

Trial Examiner Norwood: I think the line must be drawn somewhere. I am just trying to see where to draw it. Counsel sees that.

Mr. Ewing: I am particularly concerned in view of the amendment to the complaint eliminating the charge.

Mr. Wright: Your Honor, I would like to reframe my offer of that exhibit.

I now offer into evidence Commission's Exhibits 784-B, 784-D, and 784-F.

Trial Examiner Norwood: Any objection to that?

Mr Welch: No objection.

Trial Examiner Norwood: Received.

856 (The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 784-B, 784-D, and 784-F were received in evidence.)

By Mr. Wright:

Q. I hand you documents marked Commission's Exhibits Nos. 785, 786, 787, 788, 789, and 790, for identification, and ask you to state what they are, if you know.

Mr. Welch: Your Honor, there is an objection to the witness stating what the documents are. The documents speak for themselves as to what they are.

Trial Examiner Norwood: Well, he will have to identify them some way.

Mr. Wright: Your Honor, the question was to state anything he knew as to what those documents were. Now, if he is going to identify them he must do it by stating what he knows about it.

Trial Examiner Norwood: He can tell what he thinks they are. He can't tell what he thinks they say.

Mr. Welch: All the witness can possibly know, Your Honor, is who he got them from. He doesn't know what they are.

Trial Examiner Norwood: Well, he can tell us what he asked for.

Mr. Welch: And what he got. That is all.

Trial Examiner Norwood: And what he got.

857 Mr Wright: And state any representatives which might have been made to him at the time he got them as to what the documents were.

Trial Examiner Norwood: Go ahead.

The Witness: These documents were furnished me by Mr. McDowell August 9, 1945, in request for price lists on white lead and other pigments, effective at various periods in the Los Angeles territory of the Sherwin-Williams Company. The markings, such as crosses and dates appearing on these documents were present at the time the documents were handed to me.

The writing setting the word forth "Los Angeles" was put on these documents by the writer at the time they were received, with other information and exhibits from Mr. McDowell.

By Mr. Wright:

Q. Did you mean "by the writer"?

A. By the witness.

Q. Was a representation made to you as to whether or not these documents represented the quotations and terms of sale?

Mr. Welch: Object to the form of the question, Your Honor.

Trial Examiner Norwood: Objection sustained.

By Mr. Wright:

Q. Were any representations made to you as to
858 the nature of these documents?

Mr. Welch: Object to that, Your Honor.

Trial Examiner Norwood: Objection overruled.

The Witness: These documents, as I originally said, were furnished me, upon my request for prices on the sale of white lead and other pigments in the Los Angeles, Calif., district of the Sherwin-Williams Company.

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibits 785, 786, 787, 788, 789, and 790.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 785, 786, 787, 788, 789, and 790 were received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked Commission's Exhibit, for identification, 791-A through J, and ask you to state what they are, if you know?

A. Commission's Exhibit No. 791-A is a letter received from me—by me from T. J. McDowell, general counsel, Sherwin-Williams Company. It was dated September 27, and refers to the attached documents known as—identified as Commission's Exhibit 791-B through 791-J, and were
furnished to the writer at his request for certain
859 freight rates from various points of shipment, of the Sherwin-Williams Company, to stores of the company, as of January 15, 1941, and October 1, 1941, of dry white lead and white lead-in-oil.

Q. You referred to the writer's request, in your statement.

A. I meant the witness' request. Wherever I say "writer" I mean "witness."

Mr. Wright: Your Honor, I offer Commission's Exhibit 791-A through J into evidence.

Trial Examiner Norwood: Any objection?

Mr. Welch: Counsel for Sherwin-Williams state, first, that they concede that this information shown in Commission's Exhibit 791-B through J is freight information that was furnished to the witness by the company, but, of course, no concession is made that that represents the actual applicable freight rate to any of those destinations.

Objection is made to the reception of the document into evidence for the reason that it shows freight rates solely between the company's plant in Chicago, Ill., to its own retail stores located in some—I don't know how many—towns throughout the United States, but this company operates a number of retail stores where it sells paint to a customer who comes in and buys a quart or a gallon, and this freight information is with respect to shipments to its own stores.

Mr. Wright: Your Honor, I submit that the exhibits 860 speak for themselves, and I will call your attention to Commission's Exhibit 791-B, which is a statement "Existing l. c. l. and c. l. rates on dry white lead and white lead-in-oil on hundred pound drums from Chicago, Ill., to various points, as of January 15, 1941."

Trial Examiner Norwood: Well, I think if there are any discrepancies there between the rates between these stores and the rates between the cities, it can be shown.

Mr. Welch: Well, Your Honor, we take the position that the freight rates to our own store—that is an item of cost in connection with the purely retail sale and that that freight rate is of no consequence whatever in this proceeding, and we insist upon our objection.

Trial Examiner Norwood: What is your view of that?

Mr. Wright: Well, Your Honor, I am not ready to concede the validity of that objection, but certainly I think Your Honor could take judicial notice of the fact that the freight rate from Chicago, Ill., to, for instance, Scranton, Pa., would be the same whether or not it covered a sale to a Sherwin-Williams Company-owned store in Scranton or to an individual dealer who was purchasing from Sherwin-Williams.

Trial Examiner Norwood: Yes; but he says that the

freight rates between those places are not relevant in this inquiry because it is to their own stores and I presume he means they are not reflected in any price.

861 Mr. Wright: Your Honor, we are prepared to show, and will show invoice material secured from the company, sales to various places upon this list to customers who were not company-owned stores of the Sherwin-Williams Company.

Trial Examiner Norwood: Well, subject to that—

Mr. Welch: Well, Your Honor, if I may reply to that statement, the sales to which counsel refers in cities other than company-owned stores are dealer customers. We here are selling in these retail stores to the retail user, and that is purely an intrastate transaction, if there ever could be one. We operate some several hundred retail stores.

Trial Examiner Norwood: Well, are prices to dealers involved here? Are they?

Mr. Wright: No, there is nothing about prices in this exhibit, but, yes, prices to dealers are involved—

Trial Examiner Norwood: Prices to consumers?

Mr. Wright: Yes, sir; prices to consumers, both by Sherwin-Williams' wholly-owned stores, and by dealers who purchase lead-in-oil, and other pigments from Sherwin-Williams Company are involved.

Trial Examiner Norwood: Well, there might be some things there that might be of use to us, and we can't use them if they are excluded.

Mr. Wright: As I wish to point out to Your Honor, the list itself does not purport to show freight rates to 862 company-owned stores. It shows freight rates from Chicago, Ill., to certain designated points.

Mr. Welch: What is the meaning of this "s-t-o-r-e-s"?

Mr. Wright: I don't know what it means. I am telling you what the document says and what the document itself clearly shows it to be.

Mr. Welch: The witness stated in his testimony that it involved freight rates to retail stores from Chicago, Ill.

Trial Examiner Norwood: I will overrule the objection and receive it, and if it appears to not meet our purpose we can strike it.

Mr. Welch: Note our exception, please.

(The documents heretofore marked for identification COMMISSIONER'S EXHIBITS NOS. 791-A, 791-B, 791-C, 791-D, 791-E, 791-F, 791-G, 791-H, 791-I, and 791-J were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. I wish to ask the witness: I call your attention to a document marked for identification as Commission's Exhibit 792-A through D, and ask you to state what it is, if you know.

Mr. Welch: Objection. The document speaks for itself.

The Witness: Commission—

Trial Examiner Norwood: That is something that
863 he wants to identify?

Mr. Wright: Yes, sir. I believe Your Honor ruled on a similar objection.

Trial Examiner Norwood: Objection overruled. You can identify that, what you understand it to be, where you got it, and so on.

The Witness: Commission's Exhibit 792-A is a letter received by me, dated August 3, 1945, from Mr. T. J. McDowell, general counsel for the Sherwin-Williams Company, and attached to the letter are the documents known as Commission's Exhibits 792-B through 792-D, and set forth the less-than-carload and carload rates on white lead and white lead-in-oil, from Chicago, Ill., to various points, as of June 22, 1945.

By Mr. Wright:

Q. Do you recall the request that you made of the person who supplied that to you?

A. These documents were furnished to the witness in response to a request for the information described and contained therein.

Mr. Wright: Your Honor, I offer Commission's Exhibits 792-A through D into evidence.

Mr. Welch: Objection, Your Honor, as to 792-B, C, and D. 792-B and C both show that those are freight rates from Chicago, Ill., to their stores in these various towns, and is the same objection that I had a moment ago.

864 792-D is in connection with shipments from Chicago, Ill., to warehouses, and I can't conceivably understand what the freight rate between our manufacturing point and our warehouses has to do with this lawsuit when it is shown by all the documents already in the record that we charge a certain price plus freight from certain distribution points which are not involved in the warehouse schedule; that is, the freight from Chicago to the warehouse. Freight is charged only from the warehouse out to the ultimate destination.

The Witness: I might add to my explanation of these documents—

Mr. Welch: Objection, please, to the witness answering further until there is a ruling on the objection.

Mr. Wright: Your Honor, in answer to the objection, I call your attention to Commission's Exhibit 792-A, which characterizes the information contained in the exhibit. I disagree with counsel's interpretation of the meaning of those exhibits and urge that they are relevant and material.

Trial Examiner Norwood: What about this shipment from the factory to their warehouses in another city?

Mr. Wright: Well, Your Honor, we went into this—the same question, I believe it was, yesterday or the day before, regarding the freight rates from the factories of the various respondents to their warehouses.

865 The complaint alleges price discrimination in the failure to give customers of the respondents the benefit of their advantageous location to the factories and the discriminatory use of a zone system which deprives them to the benefit of their location by the amounts of the freight rates involved in shipping to the more distant customers of the respondents, and without the freight information which is involved in these shipments from the factories to the warehouses and from the warehouses to the customers where the sales are made, it cannot be determined in the record the amount of the discrimination alleged in the complaint, nor can it be determined whether or not the zone differentials alleged in the complaint to be discriminatory are, in fact, discriminatory when they purport to make due allowance for differences in cost of transportation.

Trial Examiner Norwood: In other words, you use this in figuring out the actual cost of delivery; is that right?

Mr. Wright: It shows on its face that that is what is involved.

Mr. Welch: Your Honor, I take it any further statement on my account would be futile.

Trial Examiner Norwood: It would be very difficult for me to draw a line on these freight things here. It appears to me that they will be of some use there, certainly, in figuring out the actual cost of delivery.

866 I shall overrule the objection—

Mr. Welch: Exception.

Trial Examiner Norwood: —and if I am wrong about that, why, I can strike it later.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 792-B, 792-B, 792-C, and 792-D were received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back to the record.

By Mr. Wright:

Q. I show you herewith a document marked for identification as Commission's Exhibit 793, and ask you to state what it is, if you know.

A. This is a map which was prepared by me from one which was found in the offices of Mr. James E. Campbell, who is the manager of the credit and accounting department of Sherwin-Williams, and is an extact duplicate thereof as prepared in his office, and sets forth the boundaries of the various zones—strike "zones"—various districts of the Sherwin-Williams Company throughout the United states.

Q. I call your attention to the words "N. P." on the upper lefthand corner, and "C. P." below it, and "S. P." Will you explain those remarks?

A. Those designations, "N. P.," according to Mr. 867 Campbell means "North Pacific." "C. P." stands for "Central Pacific." "S. P." is South Pacific. There is a district also set forth as western, "S.W.," meaning "southwestern"; "G.S.," meaning Gulf States; "N." meaning "northern"; "S.E.," "southeastern"; "S. A.," "South Atlantic"; "N.A.," "North Atlantic."

Q. I call your attention to the points on the map encircled in red, and ask you to state the significance of that, if you know it.

A. Those designate the towns or cities in which the district office of each of the above-described districts is located. This map was drawn or copied by me for the reason that the map—

Mr. Welch: Objection. This statement is not being made in response to any question, Your Honor.

Mr. Wright: Would you read the statement?

Mr. Welch: I think it is for counsel, himself, to describe his case rather than the witness.

Mr. Wright: We asked him to describe it.

Trial Examiner Norwood: Well, describe it and identify it in general terms without stating its contents.

The Witness: —for the reason that Mr. Campbell stated that he had no other copies of the map that he used in connection with the purpose for which his map was used.

Mr. Wright: Your Honor, I offer Commission's Exhibit 793 into evidence.

868 Trial Examiner Norwood: Any objection?

Mr. Welch: Objection? According to the statement of the witness this map merely describes certain districts of the company and its district offices, and is not by any stretch of the imagination to be construed as a pricing map, and is not a zone map, and does not conform to the zone system alleged in the complaint, or anything else. It is merely a map showing the location of their district offices and the divisions of these districts, and those are not in any way related to any alleged zone system.

I say it is entirely immaterial and incompetent.

Mr. Wright: Your Honor, there is no allegation on the part of the attorneys for the Commission that this is a zone map used in the pricing of lead pigments. However, it is a map which shows the set-up of the Sherwin-Williams Company for doing business in lead pigments, and will be of great benefit in determining the—in considering the material which will be in the next exhibit which we wish to mark, which consists of the invoice records of the Sherwin-Williams Company.

Trial Examiner Norwood: Now, you propose to connect that up with the pricing method?

Mr. Wright: We propose to connect that up with the method of the Sherwin-Williams Company of receiving orders and of shipping orders to customers, which we will show, the areas from which they ship and from
869 which they receive orders, and it is relevant and material as showing the method of doing business of the Sherwin-Williams Company in connection with the sale of lead pigments.

Trial Examiner Norwood: Received as marked. Objection overruled. Exception allowed.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 793 was received in evidence.)

Mr. MacIntyre: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

That is, it is received subject to connection, which the counsel promises.

(Discussion off the record.)

Trial Examiner Norwood: Back to the record.

Mr. Welch: Counsel for Sherwin-Williams agrees that it effects sales of white lead at retail to its customers through and at the location of its retail stores as they are listed on Commission's Exhibit 652-A to L, inclusive.

Off the record.

(Discussion off the record.)

Mr. Welch: And further states that it is and has been the regular practice of Sherwin-Williams Company in making sales of white lead through and at the location of its above-referred-to retail stores to quote and charge
870 its published delivered prices as are shown to have been applicable at each such destination. The practice thus followed has been and is in accordance with the policy of Sherwin-Williams Company pursuant to the instructions of its manufacturing officials.

Now, while the statement above made is a statement as to the existence of certain facts, counsel for the respondent Sherwin-Williams Company objects to the inclusion of such statement in the record for the following reasons:

That the operation of the company's retail stores is purely an intrastate matter, and the method in which it sells white lead, or any other product, to retail customers in retail stores is of no concern to the Federal Trade Commission, and we object to the inclusion of the statement in the record, though I do not deny that those facts exist; in fact, I agree they do.

Mr. MacIntyre: We contend that they are relevant and material facts.

Trial Examiner Norwood: Yes. In other words, the counsel admits facts but controverts the—

Mr. Welch: Materiality and relevancy to this proceeding.

Trial Examiner Norwood: Yes. That is right.

Counsel's objection is overruled, and the statement may be entered on the record; that is, counsel's objection to the relevancy of the statement is overruled, and it may
871 appear on the record.

Mr. Wright: As evidence of the facts?

Trial Examiner Norwood: Well, it may appear on the

record. Period. That is evidence of the thing. That is an admission, a very high type of evidence.

Mr. Wright: Still off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 1:30, when we will reconvene in Room 388, this building.

(Whereupon, at 12:10 o'clock p. m., a recess was taken in the hearing until 1:30 o'clock p. m. of the same day.)

872. Afternoon Session.

Room 388
1:30 P. M.

Trial Examiner Norwood: The hearing will come to order.

(Documents were thereupon marked for identification Commission's Exhibits Nos. 794-A, 794-B, 794-C, 794-D, 794-E, 794-F, 794-G, 794-H 794-I, 794-J, 794-K, 794-L, 794-M, 794-N, 794-O, 794-P, 794-Q, 794-R, 794-S, 794-T, 794-U, 794-V, 794-W, 794-X, 794-Y, 794-Z, 794-Z-1, 794-Z-2, 794-Z-3, 794-Z-4, 794-Z-5, 794-Z-6, 794-Z-7, 794-Z-8, 794-Z-9, 794-Z-10, 794-Z-11, 794-Z-12, 794-Z-13, 795-A, 795-B, 795-C, 795-D, 795-E, 795-F, 795-G, 795-H, 795-I, 795-K, 795-L, 795-M, 795-N, 795-O, 795-P, 795-Q, 795-R, 795-S, 795-T, 795-U, 795-V, 795-W, 795-X, 795-Y, 795-Z, 795-Z-1, 795-Z-2, 795-Z-3, 795-Z-4, 795-Z-5, 795-Z-6, 795-Z-7, 795-Z-8, 795-Z-9, 795-Z-10, 795-Z-11, 795-Z-12, 795-Z-13, and 795-Z-14.)

Mr. Wright: Mr. Reel, will you please resume the stand?

DAVID R. REEL resumed the witness stand and testified further as follows:

Direct Examination (Resumed) by Mr. Wright.

873 Q: Mr. Reel, is my understanding correct that you testified this morning that you made an investigation of invoices furnished you by Sherwin-Williams Company?

A. Invoices and other information, yes.

Q. I show you document marked for identification Commission's Exhibit 794-A through Z-13, and ask you if you recognize it.

A. Yes.

Q. Will you state briefly what the exhibit is?

A. The exhibit is a tabulation of price and freight data on sales of white lead to customers of the Sherwin-Williams Company in various towns and cities in the United States for different periods of time.

Q. Is that exhibit in your own handwriting?

A. Not all of it. Some is in the handwriting of Mr. Fred MacManus, an attorney of the Federal Trade Commission, and some of the figures set down have been posted by Mr. James S. Kelaher, an attorney of the Commission, all of which has been rechecked by me.

Q. Were the entries made by others than yourself done under your direction and supervision?

A. Yes.

Q. Is all the information contained in Commission's Exhibit 794-A through Z-13 information which was secured from the records of the Sherwin-Williams Company, or supplied by officials of the Sherwin-Williams Company?

874 A. It was.

Q. Does the information appearing in the exhibit accurately reflect the information in the records of the Sherwin-Williams Company?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 794-A through Z-13 in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 794-A, 794-B, 794-C, 794-D, 794-E, 794-F, 794-G, 794-H, 794-I, 794-J, 794-K, 794-L, 794-M, 794-N, 794-O, 794-P, 794-Q, 794-R, 794-S, 794-T, 794-U, 794-V, 794-W, 794-X, 794-Y, 794-Z, 794-Z-1, 794-Z-2, 794-Z-3, 794-Z-4, 794-Z-5, 794-Z-6, 794-Z-7, 794-Z-8, 794-Z-9, 794-Z-10, 794-Z-11, 794-Z-12, and 794-Z-13 were received in evidence.)

Mr. Welch: Your Honor, we do not want that failure to make an objection to be understood or considered as any admission on the part of the respondent that data therein contained is or is not correct in any respect.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 875 794-C, the information appearing under the column "Freight Rates," and ask you the source of that information?

A. The freight rate information was furnished to me by Mr. McDowell as being freight information relative to the shipments set forth on this document prepared either by the Southwestern Division of the company or by the freight department in the Cleveland offices.

Q. Were officials of the Sherwin-Williams Company able to supply for the purpose of this exhibit actual freight rates which had been used in shipping the particular pigment involved in the particular transactions set forth?

Mr. Welch: Objection.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Overruled.

Did you ask them to supply it?

The Witness: These figures were supplied to me upon my request for freight rates on the white lead shipments shown on this document.

By Mr. Wright:

Q. I call your attention to the column on Commission's Exhibit 794-C, headed "House Copies, Date Shipped," and ask you the significance of the information appearing in that column?

A. The column sets forth dates on which material 876 set forth in the invoice or house copies were shipped, and these dates were so set up on the various house copies or invoices, appearing on the face of them.

Q. Is there any information in this exhibit which shows as to each transaction listed the date on which the purchaser ordered the material from Sherwin-Williams?

Mr. Welch: Objection. The document speaks for itself as to what information it shows.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Trial Examiner Norwood: He may explain those entries up there to tell us what those dates refer to.

Mr. Welch: He has already told us what the dates do refer to. The question now is whether it shows something or doesn't show it, and that is something to be ascertained

by an examination of the document. That is not a matter of any explanation.

Trial Examiner Norwood: If he has any further explanation he may give it.

The objection is overruled.

The Witness: These dates set forth in the column marked "House Copies, Date Shipped," as I stated before, were taken from the invoice, from the face of the invoice where a stamp is used by the company showing the date the order was shipped.

877 It does not set forth the date on which any order had been received by the particular customer. Nevertheless, the house copies, or invoices, did show the date that the material was ordered by the customer.

By Mr. Wright:

Q. In connection with your investigation and in making up this exhibit, did you examine invoices of the Sherwin-Williams Company?

A. Yes.

Q. Can you estimate the number, roughly, of invoices that you did examine?

A. I refreshed my memory as late as this morning to do that, and to do so I examined various original copies of these invoices or house copies, and found that in the numerous ones which were available that the shipments were made at a date after the same, or within three weeks of the date the material was shown as having been ordered by the customer.

Mr. Welch: I move that the answer be stricken as not responsive to the question.

Trial Examiner Norwood: Read the question and answer.

(The reporter read as follows:

"Q. Can you estimate the number, roughly, of invoices that you did examine?

"A. I refreshed my memory as late as this morning to do that, and to do so I examined various original

878 copies of these invoices or house copies, and found that in the numerous ones which were available"—)

Trial Examiner Norwood: The reporter will strike with the words "and found."

Now, you asked if he examined it, and he said he did.

Mr. Wright: I still don't think the witness understood the question. I asked if he could estimate the number of

invoices, approximately, of Sherwin-Williams that he examined during the course of his investigation.

Trial Examiner Norwood: Answer the question, now, as last stated, if you can estimate it. I think you can answer it "yes" or "no."

Mr. Welch: Your Honor, we will stipulate several hundred were examined.

Mr. Wright: I would like to get the witness' answer, if he has one.

Trial Examiner Norwood: Very well.

The Witness: There were anywhere between 600 and —may we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I think that could be answered "yes" or "no."

The Witness: Yes.

879 By Mr. Wright:

Q. Will you state the approximate number?

A. Around 25,000.

Q. Do you recall whether the invoices of the Sherwin-Williams Company which you examined contained on their face an entry of the date of the customer's order of the transaction involved?

Mr. Welch: Objection. The invoices, themselves, are the best evidence of what information is contained on them.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Trial Examiner Norwood: He is asking if you recall something, and you can tell him whether you recall that or whether you do not. Don't answer this question by saying what you recall. Just answer the question directly.

The Witness: Yes.

By Mr. Wright:

Q. Did they show the date of the customer's order?

A. Yes.

Mr. Welch: Objection.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Can you state from your examination of the invoices of the Sherwin-Williams Company which you ex-
880 amined, whether or not there was any appreciate

length of time between the date of the order appearing on the invoices, and the date of shipment?

Mr. Welch: I object to the form of the question and also object to the witness being permitted—

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Mr. Welch: The Commission itself has those invoices and the invoices, themselves, are the best evidence of the lapse of time between the date of the order and the date of the shipment, if that is material.

Trial Examiner Norwood: I permitted the witness to give a little information there.

Mr. Welch: And further than that, how can he generalize on some 25,000 invoices he said he examined.

Trial Examiner Norwood: I think counsel's point is well taken.

Mr. MacIntyre: Your honor, we do not have all these invoices, and, in the second place, we are trying to have the record show that this witness knows or what he can recall from what he saw in the invoices.

Even the invoices, themselves, are not more competent than what someone can show that the invoices show. The invoices are in the possession of the respondent.

Trial Examiner Norwood: That is head on as 881 against the best evidence rules.

Mr. MacIntyre: This is a general situation shown by 25,000 invoices.

Trial Examiner Norwood: That is some job, to show what that shows.

Mr. MacIntyre: We think we are doing it right now.

Trial Examiner Norwood: That would be a pretty good short-cut. If you can lay the grounds for that parol evidence, if they are lost or not available, or you gave notice and they did not produce—

Mr. Welch: Your Honor, that condition is certainly not true. We supplied every invoice requested, the Commission had them for months, and some they still have.

Trial Examiner Norwood: I was pointing out how he could lay the grounds; I was not making a statement about the situation.

Mr. MacIntyre: Your Honor, the invoices are in the custody of the respondent who is here making the objection.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: We have only a few samples of the invoices. We are here with a witness who has seen all of those invoices, the 25,000 in the possession of this respondent, has noted what they contain, and, through his sworn testimony, we are offering for the record a showing of the fact that is evidenced by all of these invoices. We con-
882 tend it is competent evidence, relevant, and material.

Trial Examiner Norwood: Not in the face of an objection, if the invoices can be obtained. You may show that after you lay the grounds for it, and show that the invoices cannot be obtained.

Mr. MacIntyre: Your Honor, we do not deny that the invoices are more difficult to obtain than all the freight rates would be over here at the I.C.C. Building, but we do contend that if we had a man who could factually testify on the rates which are on file at the I.C.C. it would be a matter of proper evidence for him to do so, as well as to bring the I.C.C. rates over here to put into evidence.

Mr. Welch: Your Honor, our position is simply this: We supplied the invoices, the Commission decided what information they wanted to take off of them, and they took it. They have now decided they want to use some other information which the attorney-examiner has testified has been on there, but they did not take off because at that time they did not think it important, and now they think it is. Now, they are trying to bring it in in a secondary roundabout way, and I cannot subscribe to it.

Mr. Wright: Your Honor, all of these tabulations are in a sense secondary because this type of information was so much easier to make—

Trial Examiner Norwood: And we have a right to
883 receive that under our administrative practice, but such tabulations purport to contain exact information. It is not just an estimate.

Mr. Welch: We are not raising any question at all that the tabulations, themselves, in so far as they go, are not a correct reflection, and we realize that is secondary evidence, and I advised Commission's counsel weeks ago that I would make no objection on the question of best evidence as to the tabulation itself.

Isn't that correct, Mr. Wright?

Mr. Wright: That is correct.

Trial Examiner Norwood: I think the Commission must get the other evidence just like they got this, and present it in the same way.

Mr. Wright: Your Honor, we have the man on the stand who prepared this information, and he has testified he does have a recollection of the invoices which he examined. He is willing to swear as to certain information which he saw in those exhibits.

Trial Examiner Norwood: It is carrying it just a point further than this other matter here which we have permitted, and I think that we must put everything on the same basis here, and that is you must give some information about it. You must get that information, like you did before, by a survey and a tabulation, and certainly you
884 may show exactly what the invoices show.

The objection is sustained.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed with your examination of the witness.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Welch.

Q. Mr. Reel, you testified this morning that Commission's Exhibit 775-A and B was given to you by Mr. McDowell. I believe you were questioned as to what representations were made to you at the time the documents were delivered.

Were any representations, in fact, made, or was the document just supplied to you in response to a request for a list of warehouse points?

A. I believe that Mr. McDowell and I talked over the various questions I had regarding the material and information that I wanted, and this was obtained and presented to me upon my request for the information it contains.

Q. That is right, except there were no independent collateral representations made except such as appear on the document itself?

885 A. Not that I can directly and particularly recall.

Q. Now, 778-A and B: On direct examination this morning you were questioned as to representations made to you in connection with those two documents. Were any representations, in fact, made other than that the document was handed to you for the purpose of complying with the request you made for certain information?

A. Except the general conference that he and I had regarding the information.

Q. But there were not any independent representations as indicated by counsel for the Commission this morning, as to what that document is, other than what it purports to be on its face, was there?

A. I can't recall of any in particular regarding the specific exhibit.

Q. Now, with respect to Commission's Exhibit 792-B and C which involves freight rates between Chicago, Ill., and various points, and a list entitled "Stores," who designated those cities as being ones to which you wanted the freight rates?

A. May I see that?

Q. (Document handed to witness.) Did you make that selection?

A. No.

Q. Who did make it?

886 A. Apparently it was made by the Sherwin-Williams Company. It was done, however, upon my request.

Q. What was the specific nature of your request?

A. That I wanted the less-than-carload and carload rates on the shipments of white lead and white lead-in-oil from its point of origin or manufacture to the various towns and cities in which towns warehouses of the company may be located.

Q. And this was supplied to you in answer to that request?

A. Yes.

Trial Examiner Norwood: Some of those names are checked and some are not checked. What does that signify?

The Witness: I am unable to state. I don't know whether—

By Mr. Welch:

Q. You don't have any independent recollection at the present moment as to how those got on there?

A. No.

Q. Now, in connection with Commission's Exhibit 791-B to J, inclusive, I take it there that you asked for information as to freight rates from the point of manufacture, Chicago, Ill., to various cities in which the company owned and operated retail stores, and that is the information that was furnished in response to your request?

A. Retail stores and warehouses for the certain
887 period involved; that is right.

Q. Now, Mr. Reel, in connection with the preparation of Commission's Exhibit 794-A to Z-13, I believe you asked the company for all invoices containing shipments of white lead during three separate periods of time, from all the district offices?

A. That originally was done.

Q. And those were all submitted to you, everything, as far as you know?

A. Yes.

Q. Then, from that large group which you say you estimated to be around 25,000—is that correct?

A. I would not say that, no, because the invoices supplied me from the various divisions or division offices amounted to a very small—probably not over 500, 600, or 700 invoices—

Q. To what does the 25,000 figure apply?

A. To the numerous invoices I had to go through while in the Cleveland office to find a few white lead sales that were indicated in the file.

Q. I see. So there were not 25,000 invoices showing sales of white lead?

A. No. You asked me—

Q. I am not trying to trap you. I am just trying to understand the thing myself.

888 You examined a total of approximately 25,000 invoices to pick out about how many hundred that involved white lead?

A. I would say 600 or 700, approximately.

Q. Now, of the 600 or 700 that you—

A. Pardon me. I wish to correct that, because as I made these lists and these tabulation sheets, these were made from selected invoices of those presented to me, and these, I believe, amount to somewhere between 600 and 700.

The ones submitted by the divisional offices amounted in some cases to maybe 33 per cent more than I actually listed, and in other cases maybe just 10 per cent more than I actually listed.

Q. That is, they sent you in invoices containing white lead in excess of those you have listed in the exhibit, Commission's Exhibit 794-A to Z-13?

A. That is right.

Q. And the excess ranged from 33⅓ per cent down to 10 per cent?

A. I would say it is a fair estimate.

Q. Would it be fair to say that all the white lead invoices during the three periods of time amounted to not more than 1,000 invoices, based on your statement that there are 600 in the record, and that the excess would run at the maximum 33⅓ per cent, and taking that outside figure?

A. I meant to say that it ran from 33⅓ per cent to
889 90 per cent of the invoices I used out of those sent in by the divisional offices. When I said 10 per cent, I was deducting in my mind.

Q. So that the 600 that you have in the record represents the 33⅓ per cent to 90 per cent of the total number of invoices involving white lead?

A. Of the total number of invoices furnished me involving white lead, I would say that is correct.

Q. You requested all invoices involving white lead to those towns for those periods?

A. That is right.

Q. And, so far as you know, that is what was furnished?

A. That is right.

Q. All right. If you used from 33⅓ to 90 per cent, what would be your best judgment as to how many invoices were in your final selection before you reduced them to Commission's Exhibit 794-A to Z-13?

A. I hesitate to answer that question because of the fact that a large majority of the invoices which were presented to me, and which I selected from the files in Cleveland, contained only small quantities of one pound to five pounds of white lead, which were entirely disregarded in this investigation, and I am wholly unable to even estimate the number we did not use, including those I looked at in the Cleveland office.

890 Q. So, then, you are unable to state to what extent the information contained in the exhibit represents a sampling of the white lead invoices from a numerical standpoint?

A. Yes.

Q. Now, you were given the original invoices by the company?

A. Yes.

Q. And you took all of the information that you then wanted off of the invoices and tabulated it onto these sheets?

A. Yes.

Q. You had each of these invoices, didn't you?
A. Yes.
Q. The company sent them down to you?
A. Yes.
Q. And you kept some of them for months?
A. A lot of them were not sent to me here. A lot were used and tabulated in Cleveland.
Q. But the company gave you free access to the invoices. Is that correct?
A. In Cleveland and Washington.
Q. And you have a large number of invoices now?
A. Well, not a large number.
Q. You have a substantial number?
A. Yes.
Q. That you have had for a long time?
A. Yes.

891 Q. All of the information that appears on the tabular sheets was taken from the invoices except the freight rate information—is that correct—that came from a different source?
A. No. The way that was handled was: The invoices that I selected for each district—
Q. Just one second, Mr. Reel. Answer my question, first, and then we will try to make an explanation.
The freight rate information which you have tabulated in connection with these various invoices was not on the invoices originally, was it?
A. That is right; it was not on there.
Q. That was supplemental information that was furnished at the time of the investigation?
A. That is right.
Q. And was not information theretofore appearing on the invoices?
A. That is right.
Q. In connection with your investigation, you asked the company officials to give you the applicable freight rates for the various shipments. That is right, isn't it?
A. That is right.
Q. And they gave you these figures?
A. That is right.
Q. You don't know whether they are right or wrong?

892 A. I have no way of knowing.
Q. In cases where there is a mixed car shipment and the tonnage of lead is less than the whole amount, you don't

know how the applicable freight rate where the lead was prorated, whether on a carload basis or less-than-carload basis, do you?

A. I have no actual knowledge. I would like to explain that, though.

Q. That is information that the company officials selected and gave?

A. Upon my request for freight information applicable to the white lead shipped in connection with that certain shipment or order.

Q. Is it your understanding that these notations as to freight, as they appear in those schedules, indicate actual freight paid by the company or by the purchaser in connection with that particular shipment of white lead?

Mr. MacIntyre: May we have the question read?

Trial Examiner Norwood: Read it.

(The reporter read the last question.)

The Witness: I assume that they do because that is what I requested.

Mr. Welch: I ask that the answer be stricken as being admittedly based on an assumption.

Trial Examiner Norwood: I think you asked for his understanding.

893 Mr. Welch: Not for an assumption, Your Honor.

Trial Exaimner Norwood: Motion denied.

By Mr. Welch:

Q. Do you have any knowledge as to whether these entries as to freight represent the actual amounts of money paid in connection with the shipments listed?

Mr. Wright: Your Honor, that question was answered a few moments ago.

Trial Examiner Norwood: This is cross-examination.

The Witness: May I have the question?

(The reporter read the last question.)

The Witness: The only knowledge that I have regarding them is that they do represent the freight on the shipments of white lead as shown by the house copy indicated in response to my request for such information.

By Mr. Welch:

Q. But you don't know whether those were the amounts actually paid in connection with the respective shipments?

A. I have no way of knowing that.

Q. Now, Mr. Reel, in connection with that information,

this exhibit, Respondents' Exhibit 794-A through 794-Z-13, in so far as it shows freight rates and total amounts paid, or total rates applicable per 100 pounds, and for the actual amount of the shipment, still does not show who ultimately paid the freight, does it, as between Sherwin-Williams
894 and the purchaser?

A. No.

Mr. Welch: That is all.

Trial Examiner Norwood: Any further examination?

Mr. Wright: No questions.

Mr. Hinds: May I ask one question there?

Trial Examiner Norwood: Yes.

By Mr. Hinds:

Q. Mr. Reel, have you any samples here of The Glidden invoices which you used as a basis of your tabulation?

A. No, I have not, except for the copies of the invoices which were furnished me by the various divisional offices outside of the Cleveland office of the company.

Q. Have you some of those here?

Mr. Wright: Your Honor, is counsel cross-examining him on this—

Trial Examiner Norwood: Yes, he is cross-examining. Let him answer the question.

The Witness: They are somewhere around here.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Hinds:

Q. Mr. Reel, do the original invoices of Glidden, concerning the transactions which are the subject of your
895 tabulation, show the date of the order?

A. The only original invoices of Glidden's that I saw were in the Cleveland offices of the company and they, as I recall, did show the date of the customer's order.

Q. In cases where there was a contract in a more formal shape than a mere order, did they show the date of that also, if you know?

A. I am not able to distinguish or recall whether or not they showed the date ordered or date of contract. I do recall that they did have the date of the order.

Mr. Hinds: That is all. Thank you.

Trial Examiner Norwood: Any further examination?

Mr. Wright: No further examination.

Trial Examiner Norwood: The witness is discharged.
(Witness excused.)
Trial Examiner Norwood: Call your next witness.
Mr. Wright: Your Honor, I would like to offer into evidence Commission's Exhibit 741, which is identified at page 387 of the record.
Mr. Gardiner: No objection, Your Honor, but there is no admission as to the correctness of the exhibit.
Trial Examiner Norwood: Received.
(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 741, was received in evidence.)
896 Mr. Wright: I now offer into evidence Commission's Exhibit 591, identified at pages 228 and 391 of the record as a zoning map used by Anaconda and International in the sale of white lead-in-oil throughout the country.
Mr. Gardiner: If Your Honor please, I object to the admission of this as a map showing any matter in which the respondent Anaconda Copper Mining Company sold or distributed any of the commodities covered by this complaint.
We admit that it was furnished by the International Smelting & Refining Company for zone application to the respondent Anaconda.
Mr. Wright: In answer to counsel's objection, the complaint alleges the relationship between the Anaconda Copper Mining Company and the International Smelting & Refining Company; that the International was a wholly-owned subsidiary of the Anaconda Copper Mining Company.
Trial Examiner Norwood: The exhibit will be received to show what the evidence indicates.
(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 591 was received in evidence.)
Mr. Wright: And I offer in evidence Commission's Exhibit No. 592, which was identified in the record at page 288 and 289, an explanation of the zone differentials of
Anaconda and International in the sale of white lead
897 throughout the country.
Trial Examiner Norwood: We will have a five-minute recess to look this over.
(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

Mr. Gardiner: If Your Honor please, we object to the introduction of Commission's Exhibit 592 as it applies to the Anaconda Copper Mining Company, admitting that it relates only to the operations of the respondent International Smelting & Refining Company.

Trial Examiner Norwood: The objection is overruled. Received.

That is, if the evidence shows that it applies in any way to Anaconda, why, it will have to be applied. That is just subject to what is shown.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 592 was received in evidence.)

Mr. Wright: Your Honor, has 592 been received?

Mr. Gardiner: 591 and 592 are in.

Mr. Wright: I now offer in evidence Commission's Exhibit No. 738-A through M, identified in the record at page 378, as quotations of prices and terms of sale for white lead-in-oil by Anaconda Copper Mining Company and its subsidiaries and affiliates, International Smelting & Refining Company.

898 Mr. Gardiner: If Your Honor please, I object to the introduction of this as any evidence against respondent Anaconda Copper Mining Company. On the face of it, it appears to be Anaconda Sales Company. There is no objection other than that.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 738-A, 738-B, 738-C, 738-D, 738-E, 738-F, 738-G, 738-H, 738-I, 738-J, 738-K, 738-L, and 738-M were received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 661-A through Z-194, which is identified in the record at pages 228 through page 238, and pages 376, 377, and 378 of the transcript, as quotations by the Anaconda Copper Mining Company and the International Smelting & Refining Company on white lead-in-oil and various dates and applicable to various territories.

Mr. Gardiner: If Your Honor please, the introduction of these exhibits is objected to on the grounds that they have no application to the respondent Anaconda Copper Mining Company. It is admitted that they do apply to International Smelting & Refining Company.

Trial Examiner Norwood: Received under the same ruling as before respecting Anaconda.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 661-A, 661-B, 661-C, 661-D, 661-E, 661-F, 661-G, 661-H, 661-I, 661-J, 661-K, 661-L, 661-M, 661-N, 661-O, 661-P, 661-Q, 661-R, 661-S, 661-T, 661-U, 661-V, 661-W, 661-X, 661-Y, 661-Z, 661-Z-1, 661-Z-2, 661-Z-3, 661-Z-4, 661-Z-5, 661-Z-6, 661-Z-7, 661-Z-8, 661-Z-9, 661-Z-10, 661-Z-11, 661-Z-12, 661-Z-13, 661-Z-14, 661-Z-15, 661-Z-16, 661-Z-17, 661-Z-18, 661-Z-19, 661-Z-20, 661-Z-21, 661-Z-22, 661-Z-23, 661-Z-24, 661-Z-25, 661-Z-26, 661-Z-27, 661-Z-28, 661-Z-29, 661-Z-30, 661-Z-31, 661-Z-32, 661-Z-33, 661-Z-34, 661-Z-35, 661-Z-36, 661-Z-37, 661-Z-38, 661-Z-39, 661-Z-40, 661-Z-41, 661-Z-42, 661-Z-43, 661-Z-44, 661-Z-45, 661-Z-46, 661-Z-47, 661-Z-48, 661-Z-49, 661-Z-50, 661-Z-51, 661-Z-52, 661-Z-53, 661-Z-54, 661-Z-55, 661-Z-56, 661-Z-57, 661-Z-58, 661-Z-59, 661-Z-60, 661-Z-61, 661-Z-62, 661-Z-63, 661-Z-64, 661-Z-65, 661-Z-66, 661-Z-67, 661-Z-68, 661-Z-69, 661-Z-70, 661-Z-71, 661-Z-72, 661-Z-73, 661-Z-74, 661-Z-75, 661-Z-76, 661-Z-77, 661-Z-78, 661-Z-79, 661-Z-80, 661-Z-81, 661-Z-82, 661-Z-83, 661-Z-84, 661-Z-85, 661-Z-86, 661-Z-87, 661-Z-88, 661-Z-89, 661-Z-90, 661-Z-91, 661-Z-92, 661-Z-93, 661-Z-94, 661-Z-95, 661-Z-96, 661-Z-97, 661-Z-98, 661-Z-99, 661-Z-100, 661-Z-101, 661-Z-102, 661-Z-103, 661-Z-104, 661-Z-105, 661-Z-106, 661-Z-107, 661-Z-108, 661-Z-109, 661-Z-110, 661-Z-111, 661-Z-112, 661-Z-113, 661-Z-114, 661-Z-115, 661-Z-116, 661-Z-117, 661-Z-118, 661-Z-119, 661-Z-120, 661-Z-121, 661-Z-122, 661-Z-123, 661-Z-124, 661-Z-125, 661-Z-126, 661-Z-127, 661-Z-128, 661-Z-129, 661-Z-130, 661-Z-131, 661-Z-132, 661-Z-133, 661-Z-134, 661-Z-135, 661-Z-136, 661-Z-137, 661-Z-138, 661-Z-139, 661-Z-140, 661-Z-141, 661-Z-142, 661-Z-143, 661-Z-144, 661-Z-145, 661-Z-146, 661-Z-147, 661-Z-148, 661-Z-149, 661-Z-150, 661-Z-151, 661-Z-152, 661-Z-153, 661-Z-154, 661-Z-155, 661-Z-156, 661-Z-157, 661-Z-158, 661-Z-159, 661-Z-160, 661-Z-161, 661-Z-162, 661-Z-163, 661-Z-164, 661-Z-165, 661-Z-166, 661-Z-167, 661-Z-168, 661-Z-169, 661-Z-170, 661-Z-171, 661-Z-172, 661-Z-173, 661-Z-174, 661-Z-175, 661-Z-176, 661-Z-177, 661-Z-178, 661-Z-179, 661-Z-180, 661-Z-181, 661-Z-182, 661-Z-183, 661-Z-184, 661-Z-185, 661-Z-186, 661-Z-187, 661-Z-188, 661-Z-189, 661-Z-190, 661-Z-191, 661-Z-192, 661-Z-193, and 661-Z-194 were received in evidence.)

Mr. Wright: I might say that these exhibits are further identified at pages 240 and 241 of the transcript.

Trial Examiner Norwood: I don't thank that you need to look that up now. You have referred us to a couple of them.

Mr. Wright: Your Honor, I now offer in evidence Commission's Exhibit 739-B through S, identified in the
901 record at page 379, showing sales and shipments of white lead-in-oil by Anaconda Copper Mining Company and the International Smelting & Refining Company from East Chicago, Ind., to various points in the country.

Trial Examiner Norwood: What is that number, now?

Mr. Wright: 739-B through S.

Mr. Gardiner: If Your Honor please, these Exhibits 739-A—B through S, are objected to as not showing sales by the Anaconda Copper Mining Company; rather, sales of the International Smelting & Refining Company.

Trial Examiner Norwood: Received under the same ruling.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 739-B, 739-C, 739-D, 739-E, 739-F, 739-G, 739-H, 739-I, 739-J, 739-K, 739-L, 739-M, 739-N, 739-O, 739-P, 739-Q, 739-R, and 739-S were received in evidence.)

Mr. Wright: Your Honor, I now offer in evidence Commission's Exhibit 671 as a document published by the Lead Industries Association and distributed to the Anaconda Copper Mining Company and the International Smelting & Refining Company.

Trial Examiner Norwood: Isn't that two sheets there?

Mr. Wright: No. It is on a backing sheet.
902 Identified in the record at page 191.

Mr. Gardiner: If Your Honor please, the same objection lies to this exhibit as to the ones previously submitted by the Commission, in that the stipulation is by the International Smelting & Refining Company. The exhibit refers to the International Smelting & Refining Company and has no reference or application to the Anaconda Copper Mining Company, and is objected to.

Trial Examiner Norwood: Counsel may have that same objection—

Mr. Gardiner: All the way through?

Trial Examiner Norwood: —all the way through to this sales evidence furnished by International; that is, as in favor of Anaconda.

Mr. Gardiner: Yes.

Trial Examiner Norwood: Received as marked. Objection overruled.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 671 was received in evidence.)

Mr. Wright: Your Honor, I now offer Commission's Exhibit 672-A through P, as identified in the record at page 191, which is a letter from the Lead Industries Association to all the members of the Lead Industries Association by the secretary, enclosing draft of a code of fair
903 competition for the industry, as received by the International Smelting & Refining Company and the Anaconda Copper Mining Company.

Mr. Gardner: No further objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 672-A, 672-B, 672-C, 672-D, 672-E, 672-F, 672-G, 672-H, 672-I, 672-J, 672-K, 672-L, 672-M, 672-N, 672-O, and 672-P were received in evidence.)

Mr. Wright: I would like to call now as a witness Mr. Frederick McManus.

FREDERICK McMANUS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you please state your full name and occupation for the record, please?

A. My name is Frederick McManus. I am an attorney-examiner for the Federal Trade Commission.

Q. How long have you been an attorney-examiner with the Federal Trade Commission?

A. With the exception of a period of about nine months,
I have been an attorney-examiner for the Trade Com-
904 mission since April, 1934.

Q. Have you ever had an occasion to make an investigation of the records of the Anaconda Copper Mining Company and the International Smelting & Refining Company?

A. Yes, I have.

Q. Will you state for the record approximately when that was?

A. Well, to the best of my recollection, it was about the—it was in June, 1945.

Q. In connection with that investigation, did you consult with various officials of the International Smelting & Refining Company and Anaconda Copper Mining Company?

A. Yes. I conferred with Mr. Hurless, whom I understand is the general manager—or, pardon me, the sales manager of the International Smelting & Refining Company.

Q. Where did you consult with Mr. Hurless?

A. Well, at the office of the International Smelting & Refining Company in, I think it is—one of the suburbs of Chicago—I am trying to remember now—in Indiana.

Mr. Gardiner: East Chicago, Indiana.

The Witness: East Chicago; is that it?

Mr. Gardiner: East Chicago, Indiana.

The Witness: In East Chicago, Indiana, yes.

By Mr. Wright:

Q. Did I understand you to state that Mr. Hurless 905 was the general manager of the International Smelting & Refining Company at East Chicago?

A. Well, to the best of my recollection, sir, he is, yes.

Q. Do you recall any other officials with whom you consulted at that time?

A. Well, there is this other gentleman in the traffic department of the office of the company in Chicago, in the Civic Opera Building. I talked to him. I can't recall his name, however.

Q. Can you state, generally, for the record the purpose of your investigation?

A. Well, the purpose of the investigation was to examine invoices covering sales of white lead-in-oil and dry white lead for certain stated periods to certain stated points, and after that examination to take certain information and transpose them upon columnar sheets in tabulated form.

Q. I hand you herewith a document which is marked as Commission's Exhibit 795-A through Z-14, and ask you if you recognize it?

A. Yes, I recognize this document.

Q. Will you state what the document is?

A. The document is a tabulation of information obtained by myself from invoices, original invoices, of the International Smelting & Refining Company.

Q. Who prepared the document, if you know?

906 A. This particular document I have in my hand, I prepared it.

Q. Are the entries in that document in your own hand?

A. Yes, they are. They are in my own handwriting.

Q. Are the entries in that document matters which were taken from the records of the International Smelting & Refining Company?

A. They are.

Q. I call your attention to the fact that there are entries here purporting to list freight rates. Will you tell us from whom you secured that information, or the source of that information in the tabulation, rather?

A. Well, it is the best of my recollection—if I may digress and give you the background on where I got these freight rates.

Trial Examiner Norwood: Yes.

The Witness: After I compiled the general information relative to sales and prices, I was referred to the traffic department of the company in Chicago, and I took the invoices and the tabulations to Chicago and requested information as to the freight rates covering these shipments. I asked that the information be submitted in the form of freight bills. A number of the freight bills covering a number of the shipments were submitted, and I entered them in this tabulation.

By Mr. Wright:

Q. Were those freight bills covering the actual 907 shipments which had been made?

A. Yes, they covered actual shipments that had been made.

Mr. Wright: Your Honor, I offer Commission's Exhibit 795-A through Z-14 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Gardiner: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Gardiner: On the record.

There is no further objection to the admission of this exhibit other than the one previously interposed to the

other exhibits as affecting these two respondents, with the exception that there is no admission as to the correctness or accuracy of these records.

Trial Examiner Norwood: Yes. Received as marked.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 795-A, 795-B, 795-C, 795-D, 795-E, 795-F, 795-G, 795-H, 795-I, 795-J, 795-K, 795-L, 795-M, 795-N, 795-O, 795-P, 795-Q, 795-R, 795-S, 795-T, 795-U, 795-V, 795-W, 795-X, 795-Y, 795-Z, 795-Z-1, 795-Z-2, 795-Z-3, 795-Z-4, 795-Z-5, 795-Z-6, 795-Z-7, 795-Z-8, 795-Z-9, 795-Z-10, 795-Z-11, 795-Z-12, 795-Z-13, and 795-Z-14 were received in evidence.)

Mr. Wright: I would like another document marked 908-909 for identification.

(The document referred to was marked for identification Commission's Exhibit No. 796-A and 796-B.)

Mr. Wright: Your Honor, in connection with the exhibit which has just been received, 795-A through Z-14, I have herewith documents marked for identification Commission's Exhibit 796-A and B, which purport to be a letter to the Federal Trade Commission signed by Horace G. Hitchcock, under date of April 12, 1946, with an enclosure, which is Exhibit 796-B, and I would like to ask counsel for International if he is willing to make a statement for the record identifying that so that it can be received in evidence for consideration in connection with the prior exhibit.

Mr. Gardiner: If your Honor please, this letter, signed by Mr. Hitchcock, of Chadbourne, Wallace, Parke & Whiteside, counsel for respondents Anaconda Copper Mining Company and International Smelting & Refining Company, is a letter of transmittal directed to the Federal Trade Commission under date of April 12 by which certain information requested by the Commission in August 9, 1945, to Mr. Charles Preusse of Chadbourne, Wallace, Parke & Whiteside was furnished to the Commission.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 796-A and B.

910 Mr. Gardiner: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 796-A and 796-B was received in evidence.)

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 795-M, to the fourth column from the left, under the heading "Date", and ask you to state what that represents.

A. That represents the date of the invoice from which the information was taken.

Q. Was that secured from the invoices, themselves?

A. Yes, sir.

Q. In all instances?

A. In all instances.

Q. Can you approximate the number of invoices of the International Smelting & Refining Company which you examined in connection with this investigation?

A. Well, it will be an approximation. Well, I have examined approximately five or six hundred invoices, but I didn't take the information from all of the invoices, for the reason that they covered shipments of lead in comparatively small quantities.

Q. I show you Commission's Exhibit 739-B and ask you if the invoices which you examined were in the same 911 form as Commission's Exhibit 739-B?

A. To the best of my recollection, they were.

Q. Do you recall whether the invoices you examined noted the date on which the order from the customer in the transaction involved was received?

A. I can answer that question by stating that I can recall that in some instances the invoices did show that. In some instances they did not.

Q. Do you recall noting from your examination of the invoices whether there was any appreciable time lag between the information of the receipt of the customer's order and the date of the shipment?

A. Well, to the best of my recollection, there was no appreciable—

Mr. Gardiner: May I have that question over, please?

(The reporter read the last question.)

Mr. Gardiner: If your Honor please, this line of examination is objected to on the grounds that this compilation from which this witness is testifying merely purports to show the dates of the invoices. Now, as to the dates of the sales, if the Commission desires to present that information we submit that the invoices are the best evidence of that fact, or a compilation drawn for that purpose. This

witness has testified that some of the invoices con-
912 tained that information, some did not, and if the Commission wishes to rely on information contained in these invoices it is submitted that that information should either be set forth in their compilation or the invoices produced for that purpose.

Mr. Wright: Your Honor, I submit again that we have on the stand a man who stated that he made a detailed examination of the business records of the company, and I believe he is competent to state whether or not he has any recollection of any such lag between those two dates which have clearly been established as appearing on the invoices which he examined.

Trial Examiner Norwood: He could answer "yes" or "no" as to his recollection, but he would not be permitted to give his recollection over objection. I will have to sustain that objection. The invoices are the best evidence of what they show.

Mr. Wright: Are you sustaining the objection to the question regarding the witness' recollection, as to whether he has any recollection?

Trial Examiner Norwood: Well, no. He may state that if you want—well, that is not relevant in view of the fact that he can't—well, I will let him answer that.

Have you any recollection of that?

The Witness: Yes, sir; I have.

By Mr. Wright:

913 Q. Will you state what your recollection is with regard to that?

Mr. Gardiner: I object to that, Your Honor, on the grounds already stated.

Trial Examiner Norwood: Yes. Objection sustained.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine him.

Cross-Examination by Mr. Gardiner.

Q. Mr. McManus, referring to Commission's Exhibit No. 795-M, I direct your attention to the first column entitled "Class," in which you have inserted the letters "D", "A", "M", and "I". Will you kindly state what those refer to?

A. Yes, sir. "D" means "dealer". "A" is "agent".

"M" is "manufacturer", and "I" would be an industrial user.

Q. Now, Mr. McManus, again referring to Commission's Exhibit 795-M, in the column headed "Rate"; am I correct in my understanding that the rate there was taken by you from the freight bills covering the shipments as set forth in this compilation?

A. That is right, sir.

Trial Examiner Norwood: That is so much per hundred?

The Witness: That is rate per hundred; yes, sir.

By Mr. Gardiner:

914 Q. And the rate set forth in that column is the rate in cents per hundred?

A. That is right. It is taken from shipping documents, freight bills, to the best of my recollection.

Q. Mr. McManus, do you recall if any of these invoices were issued by the Anaconda Copper Mining Company?

A. No. To the best of my recollection now—it has been about a year since I have seen the invoices, but I think it was International Smelting & Refining Company.

Q. In selecting these invoices, what was the purpose in choosing those that you did, so far as the time covered was involved?

A. Well, I can't answer that, sir. That was agreed upon—I could only answer that by saying that that was agreed upon by members of the investigating staff and Mr. MacIntyre, in order to expedite the investigation, to harrow it down somewhat, to the best of my recollection.

Q. Were these invoices selected with regard to the destination of the shipments?

A. As I remember, certain particular points were selected.

Q. And did you make that selection, or was that part of the program outlined to you?

A. That was part of the program.

Q. Was I correct in my understanding that you stated that Mr. Hurless was an employee of the International

915 Smelting & Refining Company?

A. To the best of my memory; yes, sir.

Q. Do you know if he has any connection with the Anaconda Copper Mining Company?

A. I do not.

Q. This information that you prepared, with the excep-

ception of the freight information, was all prepared at East Chicago, Ind.?

A. Yes, sir; the invoices were submitted to me there.

Q. And is that the plant of the International Smelting & Refining Company?

A. That is a plant of theirs, yes. I don't know whether they have any others, or not.

Q. Yes, that is a plant of theirs.

In selecting these invoices, Mr. McManus, was there any other criteria other than dates of shipments and destinations?

A. Yes, sir; the quantities of lead involved.

Q. The quantities?

A. Yes, the quantities of lead involved. That is to say, there was a number of shipments of lead in one-pound, five-pound, ten, 25-pound packages. The investigation was restricted to the shipments of lead, as I remember, in 100-pound bags, per hundredweight, 100-pound containers.

Q. Mr. McManus, in making your selection, was 916 there any program or thought given to the selection of customers or destinations which might be considered as being competitive; that is, competitive to each other?

A. Well, I didn't at any time in the investigation try to pick customers in particular areas that I thought might be competitive with one another. I just picked them all.

Q. Well, now, it is my understanding that you didn't in your compilation here included all of the invoices you selected.

A. No. I included—in this particular company, sir, I included all the invoices covering shipments of lead-in-oil in hundred-pound containers, and I took all the shipments of dry lead.

Q. Regardless of destination?

A. No, within those—

Q. Within those particular destinations?

A. —particular points, and within the particular time selected.

Q. Then, within the period of this examination—or, rather, period covered, you set forth in these sheets all in quantities of a hundred pounds or more to certain given localities?

A. That is right.

Mr. Gardner: No further questions.

Trial Examiner Norwood: Anything further?

Mr. Wright: I have no further questions, Your
917 Honor.

Trial Examiner Norwood: Thank you, Mr. McManus.

(Witness excused.)

Mr. Wood: Your Honor please, I have been just a little bit confused by the proceedings yesterday and today as to the particular purpose of those documents produced by these witnesses.

Now, when Mr. Kelaher was testifying, I attempted to protect myself by asking Mr. Kelaher whether or not he selected Eagle-Picher invoices with relation to competition between the customers. And he replied that he did not. If he would have replied the other way, that he had, I would, of course, have asked him to particularize so that I would have been in the position to meet the Commission's case factually.

Now, I would like to make the request for the record, on behalf of Eagle-Picher, that if competition between customers listed on the exhibit is to be at any time alleged in the case, that we now be notified which instances.

Mr. MacIntyre: I want to say this: That I made a selection of these destinations in the case of Eagle-Picher, Anaconda, International, National, Sherwin-Williams, and Glidden, and they were selected in part because of information that through getting invoices to customers in those locations we would have invoices showing shipments to
customers that were competitve, and we are going to
918 contend that in these instances they are in competition.

Mr. Wood: Then I would like to make the request to be notified in advance as to which instances the Commission will rely on competitive conditions.

Mr. Ewing: I think that request can certainly be made by counsel for all respondents.

Mr. Hinds: Yes, I join in that, too, in behalf of Glidden.

Trial Examiner Norwood: You wish the counsel to point out at this time just which of those customers are competitors?

Mr. Wright: Your Honor, the complaint charges that there were various forms of competition which were injured by the discriminations involved in the systematic pricing system used in this industry, and those allegations of competition between the various classes of customers

are, it seems to me, set out with as much clarity as we can do it at this time.

Mr. Ewing: I am not going to ask counsel to do the impossible, but I think the subject is one that should receive reasonable, fair treatment. After all, this is not a game of blindman's bluff. We have got, I don't know how many, entries on these sheets that have been taken from all companies. If we are not notified and given a reasonable opportunity to examine into the particular situations that will be charged against us as violations of law, then
919 we are in a helpless position of doing an enormous amount of independent work without knowing exactly what we are looking for and wasting everybody's time, so far as the respondents are concerned, and I just don't think it is fair if we don't get some reasonable opportunity.

I am not saying to Mr. Wright or to Mr. MacIntyre, "Give it to us this afternoon," because they very well might not have made up their own minds about it, but I think we should have the opportunity.

Mr. Wood: One moment, Mr. MacIntyre. My position goes beyond that.

Because Mr. Kelaher is a lawyer and an investigator, I asked him if the competitive angle was taken into account, and he said, "No". Now, I may have been misinformed.

Mr. Kelaher: I think you are misconstruing my answer.

Mr. Wood: Well, it may be I am.

Mr. Kelaher: You asked me what my considerations were. I said I had a special assignment, I was asked to go out and do a particular job, and I did it.

Mr. Wood: At any rate, I may have been misled, but certainly I am entitled to have the information which I would like to have.

Trial Examiner Norwood: Yes. Let us hear from Mr. MacIntyre.

920 Mr. MacIntyre: I want to say again that I made the selection in connection with assistance of others on the staff of the Commission, and it was done in part for determining what actual and potential—and I emphasize the last word—competition probably had been interfered with in the secondary line through price discriminations alleged in this case both in the delivered price quotations and the levels of delivered prices paid, as well as in the discriminations in net prices received by the respondents, and I do not propose to speculate today on what day a

customer in Cincinnati will actually be in competition next year with a customer in St. Louis. I say that in most of those instances there is potential competition between them where there has not actually been competition to date, and we are going to so argue it.

We are contending that now. They are paint manufacturers, they are dealings, they are paint contractors, and they are consumers who are buying, and who are injured, and, furthermore, the injury to competition is not only in the secondary line but in the primary line, and for that matter to price competition among the respondents to the injury of the public involved.

Mr. Hinds: I am going to ask also that counsel—

Trial Examiner Norwood: Stand, if the counsel is going to talk for the record.

Mr. Hinds: Pardon me.

921 I am going to ask also that counsel for the Commission notify Glidden as to which pairs of sales set forth in tabulation he claims there has been a price discrimination between the two customers involved in those pairs, so that we may be prepared to either show that the date is not comparable, if that be the fact, or to justify the difference in price if the dates be approximately the same. I am referring, of course, to the dates when the price was determined, not the date of the shipment, because we have to assume the burden of assuming any charges, each and every one of us. It is an oppressive burden, and an unreasonable one.

Trial Examiner Norwood: Well, I will say, gentlemen that your request has been recorded for the record, and in our procedure there is ample time to meet anything that comes out against you. It isn't like being in a trial that must be ended very quickly, and within a few days. The administrative procedure permits of exhaustive investigation and time to meet anything which appears on the record. Of course, counsel on both sides must be their own judge of just what appears on the record, and whether it is against them or not.

But investigations like this must necessarily be rather broad, and it will have to proceed, and we will gather up the threads later and see what it comes to.

Anything further?

922 Mr. Ewing: Might I say this.

Trial Examiner Norwood: Yes.

Mr. Ewing: I think it is conceivable that with these sheets in evidence as they are, it would not be necessary for counsel for the Commission to do anything in the way of producing additional proof under their theories, as I see it, with respect to any illustration that we might select, with the result that the testimony in this case could close, because I, as counsel, for National, might analyze my own situation and arrive at the conclusion that only certain ones needed attention, give them the attention to the extent that I could in the course of a proceeding, and then the time would come for briefs, and so on, and so forth; and I would be faced with a charge particularized in many other instances.

Now, as I see it, these price discrimination charges are very particularized. They are broad, it is true, because a wide territory is covered, but it is a specific charge with respect to certain specific situations, and I can't see how it is fair to allow us to be put in the position of never, perhaps, being able to know with any degree of certainty what the particular charge is going to be. We are accused of following unfair trade practices, but I think that is an unfair trade practice in another sense.

Trial Examiner Norwood: Well, it particularizes as to what practices?

923 Mr. MacIntyre: Well, if Your Honor please, this simply amounts, as I see it, to a request for us to specify to counsel for the respondents what we consider to be the precise effects of all of their discriminations all the way along the line. That we are not in a position of doing at this time.

Mr. Hinds: We didn't ask as to the effect. We wanted to know which ones are said to be discriminatory.

Trial Examiner Norwood: Have you anything further to present now?

Mr. Wright: No, sir; we have no further evidence to present here in Washington.

Mr. Welch: Mr. Examiner, I would like to ask Mr. Reel one or two more questions, if I might, with respect to our exhibit. We will call him for further cross for a question or two. I assume that is not objected to.

Trial Examiner Norwood: Will you permit him to be recalled for further cross-examination?

Mr. Wright: I have no objection.

Trial Examiner Norwood: Take the stand, Mr. Reel.

DAVID R. REEL resumed the witness stand and testified further as follows:

Cross-Examination by Mr. Welch.

924 Q. Mr. Reel, will you look at Commission's Exhibit 794-A to Z-13? I call your attention to Commission's Exhibit 794-H.

Can you tell me what the purpose of that page is?

A. As a part of the instructions which were given to us prior to the investigation and to be followed during the investigation of these respondent companies, we were asked to secure the names and addresses of white lead customers of the companies that we were assigned to examine, or investigate, and the addresses of those customers during the first quarter of 1943. I having to rely upon the invoices submitted by the branch offices of The Glidden Company and the Sherwin-Williams Company, could only take down the names and addresses of the white lead customers as shown by the invoices submitted by those particular offices.

Q. So, then, this really represents just a summary of the names of customers that appear on some of the other pages in the entire exhibit; is that correct?

A. That is true.

Q. Now, to which page or pages does 794-H relate?

A. 794-H, as indicated at the top of the page, "Los Angeles Office" relates to all of the pages in this tabulation with reference to—

Q. Shipments from the Los Angeles office?

A. Shipments from the Los Angeles office, and, in particular, to Commission's Exhibit 794-F and 794-G.

925 Q. Well, are all the names that appear on 794-H included in connection with particular invoices on the other pages in the exhibit?

A. No.

Q. So that we will find here on 794-H some customers' names in connection with whom you have used no specific invoice?

A. That is right.

Q. Now, I take it, then, you have the same explanation with respect to—

Trial Examiner Norwood: I find that one of the num-

bers in Commission's Exhibit 794 has been skipped and the number following the letter "J". Rather than remark a number of these exhibits here, I will instruct the reporter to mark the missing sheet "J-2" and mark the original "J" "J-1".

(The document referred to was marked COMMISSION's EXHIBIT 794-J-2 and the document previously marked COMMISSION'S EXHIBIT 794-J was re-marked Commission's Exhibit 794-J-1 and were received in evidence.)

By Mr. Welch:

Q. Now, Mr. Reel, I take it that the numbers of customers appearing on 794-J-1 involve a similar situation with respect to a different district?

A. That is correct.

Q. In other words, those are all the customers in that area whose invoices you examined?

A. That is right.

Q. Now, is there a similar compilation of customers 926 whose invoices were examined in other districts?

A. That is true.

Q. There is a similar page for each district?

A. There should be.

Q. Yes. And that statement of yours, then, would apply equally to all of them?

A. That is true.

Q. Now, Commission's Exhibit 794-Z-9 to 12, inclusive, contains freight information, tabulations of freight information, doesn't it?

A. That is true.

Q. From what source did you obtain that?

A. That was taken from the exhibits we have heretofore discussed containing the less-than-carload and carload freight rates on white lead-in-oil and dry white lead in hundred-pound drums from Chicago, Ill., to various points throughout the country.

Q. Now, which exhibits do you mean, Mr. Reel? Not the invoices that you examined in connection with preparing this stuff?

A. No.

Q. You mean some other exhibits?

A. These are exhibits known as Commissioner's Exhibits 791-A through—I should say 791-B through 791-J and Commission's Exhibits 792-B through 792-D.

927 Q. And you took the information from the two exhibits you have just referred to and transferred it to these four pages in Commission's Exhibit 794?

A. That is correct.

Q. And it is the same information?

A. Yes.

Mr. Welch: Mr. Examiner, we now move that these pages which are admitted by the witness as being a duplication be withdrawn from evidence.

Trial Examiner Norwood: Well, are they exact duplications, or just what is the situation there?

Mr. Welch: So I understand it from the witness.

Mr. MacIntyre: If Your Honor please, we submit that it is a tabulation of some of the information that is contained in some of those exhibits, according to the testimony just given by the witness.

Trial Examiner Norwood: Are those tabulations on the same basis, for the same purpose?

The Witness: The tabulations shown as Commission's Exhibit 794-Z-9 through 794-Z-12 appears to be a duplicate of the information contained in Commission's Exhibits 791-B through 791-J. There is no duplication appearing in the tabulations of Commission's Exhibits 792-A through 792-D.

Mr. Welch: Correct in that?

928 Mr. Wright: I will have to examine that before I can say more specifically.

Mr. Welch: I will have to call Your Honor's attention to the fact that the four pages in question have been prepared by him from other documents which have already been introduced in evidence, and we respectfully urge that these four pages be withdrawn or deleted.

Trial Examiner Norwood: Well, are they identical tabulations or just—

Mr. Welch: Identical tabulations, as I understand it from the witness.

Trial Examiner Norwood: Are these by this same witness?

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Now, what have you to say about that?

Mr. Wright: Your Honor, I state that while the information contained therein is similar, and that the informa-

tion contained in 794-Z-9 through 13 was obtained apparently from 791-B through J, that it is so arranged in 794-Z-9 through 13 that it makes the record clearer and the information more accessible.

Trial Examiner Norwood: This Commission's Exhibit 791-A through J, and 792, is the basis for the tabulations; is it?

929 Mr. Wright: That is what the witness has testified to.

Trial Examiner Norwood: Well, I shall overrule the motion. Motion denied.

Anything further?

Mr. Welch: Yes, I have one or two more questions.

By Mr. Welch:

Q. Mr. Reel, when you examined Sherwin-Williams' invoices, the situation was different from the Glidden one, was it not, in that instead of having just a take-off of the amount of lead involved, you saw the original invoice and whatever shipment it included in each instance, did you not?

A. No. The investigation was very similar to that of Glidden's because of the fact the only original invoices available to me were those which appeared as the permanent records of the Cleveland offices of the two companies. In all other cases the invoices—in the Sherwin-Williams' cases the original invoices were chosen and supplied to me from the branch offices, or district offices, while in the Glidden case—

Q. Mr. Reel, I am afraid you misunderstood my question. From the branch offices you got the entire invoice?

A. From the branch office, yes.

Q. And in Cleveland you had the invoice?

A. Yes.

930 Q. So that you saw everything that was on the order in addition to lead?

A. That is true.

Q. Whereas that condition did not exist to some extent in the Glidden case?

A. So far as their branch office was concerned. That is what I was getting at.

Q. Yes, but for the Sherwin-Williams' branches, you saw the entire invoices?

A. Yes.

Q. And in a great majority of those cases it involved a substantial amount of other products; did it not?

Mr. Wright: Your Honor, I object. On direct examination of this witness he was not permitted to tell what was included in the invoices that was not included in the tabulation. I think on cross-examination the same restriction should still apply.

Trial Examiner Norwood: I think he is telling what is on the invoices. Isn't that what you are asking him there?

Mr. MacIntyre: If Your Honor please, that is what was asked him on direct examination, and on an objection made to it it was sustained. In other words, only the entries made on the tabulations here is all he was permitted to testify about.

Trial Examiner Norwood: Objection sustained.

931 Mr. Welch: I believe that is all.

Trial Examiner Norwood: Thank you, Mr. Reel.

Mr. Wright: No further examination.

(Witness excused.)

Mr. Welch: Your Honor, I have one question that I would like to bring up that I, through oversight, did not raise this morning.

I did not object to the introduction of certain exhibits, which I now would like to interpose an objection to for the record, as to their applicability to count II. That is, Commission's Exhibit 662-W, being a price card which was in effect January 6, 1933, Commission's Exhibit 662-Y, a price card in effect March 11, 1935, Commission's Exhibit 662-Z-1, being a price card which was in effect April 1, 1936, all of those dates being prior to the passage of the Robinson-Patman Act, which was the basis for count II of the complaint, and I request that the admissibility of those price cards and their admission in evidence be restricted to count I.

Trial Examiner Norwood: I will certainly condition my—

Mr. MacIntyre: May I answer that?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: We have in count II, the amended complaint here, in paragraph 12, a charge that the discriminations practiced by Sherwin-Williams were for the pur-

932 pose and with the effect of enabling the respondents in this case to exactly match their offers to sell lead pigments in commerce to any given prospective purchaser at any given destination.

Trial Examiner Norwood: That is count I.

Mr. MacIntyre: No; this is count II, and this goes to that charge even though—that is, to proving purpose of the discriminations practiced after June 19, 1936. While we do not, of course, think that it would go to anything other than purpose, that is, these discriminations prior to then, they would go to purpose as alleged there in paragraph 12 of count II.

Trial Examiner Norwood: Wait a minute. I think count II is confined entirely to the Robinson-Patman Act.

Mr. Welch: To the granting of the discriminations. Not the purpose of it.

Trial Examiner Norwood: Well, is there any purpose involved in the Robinson-Patman Act? I don't recall the whole Act. Prompt me on that.

Mr. MacIntyre: Well, if Your Honor will recall, the United States Circuit Court for the Seventh Circuit and the United States Supreme Court held that when price discriminations were practiced for the purposes alleged in this paragraph 12 of count II, there can be no invocation of the procedural defense of good faith.

Trial Examiner Norwood: But did it say the 933 purpose or effect? The effect?

Mr. MacIntyre: And if we—

Trial Examiner Norwood: That is the Corn Products case?

Mr. MacIntyre: Oh, yes, Corn Products and Staley cases are the cases I am referring to.

So that if we provide any basis for a finding to support the allegation in paragraph 12 of count II, then there is no defense on the matter of good faith within the meaning of the law as laid down in those two cases.

Mr. Hinds: How does that relate to the case?

Trial Examiner Norwood: I will say that I will condition my receipt of that exhibit, Commission's Exhibit 662-W, Y and Z-1 to what I find a fair construction of the Act requires. I am not going to apply it to something to which it could not properly be applied.

Mr. Welch: Well, Your Honor, that puts us in a rather awkward position if we don't know to what extent Your Honor is going to receive it in evidence and give it consideration, and we think we have a right to know that.

Trial Examiner Norwood: I will defer the ruling on that. I want to think through that, and counsel has raised

a most interesting point there, and you are at the end of a tired day when you are likely to make errors.

Mr. Welch: All right, sir.

934 Mr. MacIntyre: If Your Honor please, sir, I would like to make our position clear that we are contending that it should remain in evidence for the showing of purpose under count II; that is, the particular exhibits that he has made reference to.

Trial Examiner Norwood: I am not clear about that.

Mr. MacIntyre: If for no other reason.

Trial Examiner Norwood: I am not clear about that at all, so I will just reserve that ruling.

Anything further?

Mr. Wright: Your Honor's reservation does not affect the admissibility of that document as to count I, I take it?

Trial Examiner Norwood: I retract that reservation. I am just reserving the ruling now.

Mr. Hinds: Off the record, now.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: After a consultation with counsel, it is offered that the hearing in this case be now adjourned to reconvene at 10 o'clock a.m., on June 24, 1946, in the Trial Room, No. 605, of the Bar Association Building, at 36 West 44th Street, New York, N. Y.

(Whereupon, at 3:53 o'clock p.m., the hearing was adjourned to Monday, June 24, 1946, at 10 o'clock a.m., in New York, N. Y.)

935 Room 605, Bar Association Bldg.,
New York City, N. Y.
June 24, 1946.

Met, pursuant to notice, at 9:00 a.m., E. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), T. J. McDowell, Esq., (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

936 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

937 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Washington, D. C. on June 20th, the hearing in Docket No. 5253 is now reconvened at 9:00 o'clock a.m., Eastern Standard Time, June 24, 1946, in

the Trial Room, Bar Association Building, 36 West 44th Street, New York, N. Y.

The appearances are as follows:

Everette MacIntyre, Paul R. Dixon and Joseph S. Wright, appearing for the Federal Trade Commission.

J. T. Welch and T. J. McDowell, appearing for the Sherwin Williams Company.

Henry E. Gardiner, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood and Richard Serviss, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, W. R. McDermott and E. Z. DuBose, appearing for The National Lead Company.

Roger Hinds, appearing for The Glidden Company.

Are you ready to go ahead, Mr. MacIntyre?

Mr. MacIntyre: If Your Honor please, we had subpoenaed for appearance here this morning as a witness, at the instance of the Commission, Mr. William Richter of the DuPont Company, Wilmington, Delaware. We were
938 informed that Mr. Richter desired to avoid appearing here if we could work out with counsel for the Respondents matters of identification of some documents, and the production of them, so as to meet our minimum requirements.

We believe we have been able to arrive at an understanding with Mr. Ewing, representing National Lead, for the presentation of some matters which will meet our minimum quirement in so far as Mr. Richter is concerned this morning, so as to relieve him from his appearance here today.

May we go off the record?

I will discuss that with Mr. Ewing.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: Will you mark these documents for identification as commission's Exhibits?

(The documents referred to were marked Commission's Exhibit 797-A, 797-B, 797-C, 797-D, 797-E, 797-F, 797-G. 797-H, 797-I, 797-J, 797-K, 797-L, 797-M, 797-N, 797-O,

797-P, 797-Q, 797-R, 797-S, 797-T, 797-U, 797-V, 797-W, 797-X, 797-Y, 797-Z, 797-Z-1, 797-Z-2, 797-Z-3, 797-Z-4, 797-Z-5, and 797-Z-6, for identification.)

Mr. MacIntyre: If Your Honor please, the subpoena which was served on Mr. Richter called for his production here this morning of documents, as well as his ap-
939 pearance to testify, and the documents listed in the subpoena was set up under four specifications: Specification No. 1, Specification No. 2, 3 and 4, as outlined in the document which is now marked for identification as Commission's Exhibit 797-A and -B.

I believe that Mr. Ewing is now prepared, on the basis of information which the DuPont Company has furnished him, to make some statement for the record concerning those documents.

Mr. Ewing: On Saturday, June 22nd, 1946, I received from E. I. DuPont de Nemours Company of Wilmington, Delaware, a letter dated June 21, 1946, of two pages which has been marked Commission's Exhibit 797-A and -B for identification, together with papers referred to therein and photostatic copies thereof. These papers consist of a document described in the letter as an original contract entered into on February 3rd, 1938, between DuPont and National Lead, a photostatic copy of which has been marked Commission's Exhibit 797-C and -D for identification, together with a copy of what is described in DuPont's letter to me as a letter agreement dated January 31, 1940, a photostatic copy of which has been marked Commission's Exhibit 797-E for Identification, and a letter agreement so described in DuPont's letter to me, dated June 26, 1942, consisting of three sheets, photostatic copies of which have been marked Commission's Exhibit 797-F, 797-H and 797-I for Identification, and what is de-
940 scribed as a letter agreement, dated June 26, 1944, a photostatic copy of which has been marked Commission's Exhibit 797-G for identification, and what the DuPont letter to me describes as a letter agreement dated May 4, 1945, a photostatic copy of which has been marked Commission's Exhibit 797-J for identification.

I also received from DuPont what they describe in their letter to me as carbon copies of the original memoranda and attachments concerning costs of producing white-lead-in-oil by National Lead Company under contract with DuPont, prepared by one W. F. Malloch. Photostatic copies

of these documents were furnished to me by DuPont, consisting of a document dated January 6, 1938, headed "Memorandum White Lead Contracts National Lead Company", the four sheets which have been marked Commission's Exhibits 797-K, 797-L, 797-M, and 797-N. This memorandum is sent me by DuPont as an office record of its.

Under the heading "Introduction", after referring to certain negotiations between DuPont and National Lead, the memorandum states: "The purpose of this memorandum is to indicate the effect the proposed contract would have on our cost as compared with what would have resulted under the 1924 contract."

What are described as the attachments in DuPont's letter to me consist of a sheet headed "Detail 1 White Lead Contracts National Lead Company Synopsis of Pro-
941 posed Contracts," bearing date January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-O for identification; sheet headed "Detail 2 White Lead Contract National Lead Company Distribution of Takings", bearing date January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-P for identification; sheet headed "Detail 3 White Lead Contracts National Lead Company Calculation of Cost Increases", with three additional pages numbered 2, 3 and 4, photostatic copies of which have been marked Commission's Exhibit 797-Q, R, S and T for identification, dated January 6, 1938; sheet headed "Detail 4 White Lead Contracts National Lead Company 1936 Average Prices Pig Lead, Dry Carbonate, CL Card Price and Differential", dated January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-U for Identification;

Sheet headed "Detail 5 White Lead Contracts National Lead Company 1937 Average Prices Pig Lead, Dry Carbonate, CL Card Price and Differential", dated January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-V for Identification;

Sheet headed "Detail 6 White Lead Contracts National Lead Company Permissible Increase in Corroding Charge to Limit Cost Increase to Twenty-Five Thousand," dated January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-W for Identification;

942 Sheets headed "Detail 7, "Consisting of Four Pages, with the heading "White Lead Contracts. National

Lead Company Derivation of Formulae For Determining Increased Costs Under Proposed Contracts vs. 1924 Contract", photostatic copies of the four sheets being marked Commission's Exhibit 797-X, Y, Z and Z-1 for Identification;

Two sheets headed "Detail 8, White Lead Contracts National Lead Company Derivation of Formulae for Increased Unit Costs Unnder Proposed Contracts vs. 1924 Contract", photostatic copies of the said sheet, being marked Commission's Exhibit 797-Z-2 and Z-3 for Identification;

Three sheets headed "Detail 9, White Lead Contracts National Lead Company, Examples of Application of the Formulae", photostatic copies of these three sheets having been marked Commission's Exhibit 797-Z-4, Z-5 and Z-6 for Identification.

Now the detail bears the date January 6, 1938, as do the other details.

Mr. MacIntyre: If Your Honor please, I would like to make reference to each of these documents and then after further statements to make offers of some of them at least into evidence, and I would like then to ask that any objections to the offers be withheld, if they have them, until the offers on all of these in this batch are made.

I refer to Commission's Exhibit for Identification 797-A and -B. Are we correct in our understanding, Mr.
943 Ewing, that that is the original of the letter from Mr. Provost of DuPont to you under date of June 21, 1946?

Mr. Ewing: That is correct.

Mr. MacIntyre: I offer into evidence a photostat of that letter which Mr. Ewing will supply the reporter.

I now refer to document marked for identification as Commission's Exhibit 797-C and D, and I ask Mr. Ewing if this is a photostat of the contract between DuPont and National Lead of February 3, 1938?

Mr. Ewing: That is a photostatic copy forwarded me by DuPont with Exhibit 797-A and -B for Identification, with the statement that they were forwarding me the original contracts of which this exhibit is a photostat. It is my understanding that that is a photostat of the original contract bearing that date.

Mr. MacIntyre: You concede it so to be for the purposes of this case?

Mr. Ewing: I do.

Mr. MacIntyre: I now make reference to document marked for identification as Commission's Exhibit 797-E, and I ask you, Mr. Ewing, if you will concede that that is a photostat of a copy of a letter from Mr. Rowe of National Lead to the DuPont Company of January 31, 1940?

Mr. Ewing: That is correct.

Mr. MacIntyre: I now make reference to document 944 marked as Commission's Exhibit for Identification 797-F, H and I, and I ask you, Mr. Ewing, if that is a photostat of a signed copy of a letter from Mr. Rowe of the National Lead Company to Mr. E. B. Melson of the DuPont Company under date of June 26, 1942?

Mr. Ewing: The document to which you have just referred is a photostat of the original letter from Mr. Rowe to Mr. E. B. Melson, signed by Mr. Rowe.

Mr. MacIntyre: I now refer to document marked for identification as Commission's Exhibit 797-G, and I ask you, Mr. Ewing, if that is a photostat of an original letter from Mr. Rowe of the National Lead, Mr. Harold Rowe of the National Lead Company, to Mr. E. B. Melson of the DuPont Company?

Mr. Ewing: That is correct.

Mr. MacIntyre: I now refer to Commission's Exhibit for Identification 797-J, and ask you, Mr. Ewing, whether that is a photostat of an original letter from Mr. Harold Rowe of the National Lead Company to Mr. E. B. Melson of the DuPont Company of May 4, 1945?

Mr. Ewing: That is correct.

Mr. MacIntyre: I now refer to documents marked for identification as Commission's Exhibit 797-K thru 797-Z-6, and I ask you, Mr. Ewing, if those documents are photostats of memoranda on which are recorded factors and other considerations which entered into the negotia-
945 tions between the DuPont Company and the National Lead Company, and which records were made by the DuPont Company?

Mr. Ewing: The exhibits to which reference has just been made were forwarded me by DuPont with its letter to me of June 21, 1946, as carbon copies of original memoranda and attachments described in the said letter as concerning "Costs of Producing White-Lead-In-Oil by National Lead Company under contract with E. I. DuPont de Nemours & Company, dated January 6, 1938, prepared by W. S. Malloch."

I concede that the documents are copies of records of DuPont, but as to the extent, if any, that their contents were communicated to National Lead, I can make no concession because I have no knowledge of the facts in connection therewith. As to the use, if any, to which they were put by DuPont, I think they speak for themselves.

946 Mr. MacIntyre: If Your Honor please, I now offer into evidence the documents which have been marked for identification as Commission's Exhibits 797-C through Z-6.

Mr. Ewing: I object to the receipt into evidence of those documents at this time upon the ground that there is no foundation which has been laid for them establishing their relevancy or competency; and I therefore object on the ground that they are irrelevant, incompetent and immaterial.

Trial Examiner Norwood: Are there any other objections?

Mr. MacIntyre: If Your Honor please, I would like to make this observation in connection with the objections made by Mr. Ewing.

These documents, with respect to relevancy, go directly to the charges contained in the amended complaint, in the mimeographed form on Page 7, sub-paragraph 7 of Paragraph 7, which is to the effect that the National Lead Company entered into contracts and understandings with E. I. DuPont, Incorporated, a large paint manufacturer, for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead.

Nothing could be more relevant than these documents that are now before you; and, not only relevant but

947 therefore material.

The competency: I think that has been established beyond question by the record made here this morning.

Mr. Ewing: I would only like to observe, Your Honor, it is true of course that the complaint contains the allegation referred to by Mr. MacIntyre. But there is nothing, either in those documents themselves, or anything in this record up to this point, which indicates that they themselves are any evidence in support of that allegation and complaint.

Trial Examiner Norwood: I shall reserve the ruling until I have had time to read the papers, which might be during the lunch hour or earlier.

Is there anything further?

Mr. MacIntyre: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

As to Commission's Exhibits 797-A and B, which counsel for the Commission offered first, I will ask the Respondents' counsel if they have any objections to that.

Mr. Ewing: No objection.

Trial Examiner Norwood: They are received in evidence.

948 (The papers referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 797-A and 797-B", were received in evidence).

Trial Examiner Norwood: And as to the others, from C through Z-6, I shall rule on those later.

Mr. MacIntyre: If Your Honor please, I now offer into evidence photostats of the documents which have heretofore been marked for identification as Commission's Exhibits 533, 534, 535, 577-A, B and C.

I refer to the record, Pages 145 and 146, and 154, as places in the record recording identification of these and statements made about them by Mr. Ewing, counsel for the National Lead Company.

I offer these as the records of correspondence between DuPont and National Lead Company concerning contracts and negotiations relating to such contracts, as are now marked for identification in the pending offer of Commission's Exhibit 797.

Mr. Ewing: We object to the receipt in evidence of the documents just offered, on the same grounds that were made with respect to Exhibits for identification 797-C to Z-6, inclusive.

Trial Examiner Norwood: I shall reserve the ruling on that until I can read them.

You may proceed.

949 Mr. Ewing: And also, I should say, as to the characterization of counsel's offer and statements with respect thereto.

Trial Examiner Norwood: If they are received they would be received as marked, and not necessarily as described.

Mr. Wright: Your Honor, we intended to call a witness to identify some material which relates primarily to The

Glidden Company next; but Mr. Hines, counsel for Glidden, is not here, so we thought we would defer that now. And at the present we have nothing more to present to the hearing today.

Trial Examiner Norwood: Off the record.

(Discussion of the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: If your Honor please, I now offer into the record Exhibits 3-A to 3-Y, inclusive, as the record of the Minutes of the first meeting of the Board of Directors of The National Lead Company. It is in photostatic form.

Trial Examiner Norwood: How is that marked?

Mr. Hines: 3-A to 3-Y, for identification.

Mr. MacIntyre: And in that connection, I refer your Honor to transcripts, Page 21, Lines 3 to 9, inclusive.

Mr. Ewing: Might I see this just a moment, your
950 Honor?

Trial Examiner Norwood: Yes, surely.

Mr. Ewing: The documents proffered, photostatic copies of the Minutes of the first meeting of the Board of Directors of The National Lead Company, held on the 8th day of December, 1891; we object to them on the ground that they are wholly irrelevant and immaterial in this case at this time. It is the organization meeting.

Trial Examiner Norwood: It is an ancient document.

Mr. Ewing: It is an ancient document. As far as The National Lead is concerned, it could not be any older.

Trial Examiner Norwood: What do you say, Mr. MacIntyre?

Mr. MacIntyre: In that connection, I refer your Honor to Paragraph 7 of the complaint, as set out on Page 4 of the mimeographed copy containing the charges as to how The National Lead embarked upon a plan and program to secure control over what competing interest then existed in the industry, and it is my contention that these Minutes, when taken with other parts of the record already made, constitute a substantial part of evidence as to how National Lead started off on the execution of that plan and program by swallowing up at that time, on December 8, 1891, some 16 competing enterprises and industries all at one fell swoop.

951 Mr. Wright: If your Honor please, the date, 1891, is specifically mentioned as the initiation of the monopolistic program.

Mr. Ewing: There is no question of course, your Honor, that National Lead was organized in 1891. There is no evidence in this record, and there will be no evidence in this record that I know of, to sustain the suggestion that these were competing interests that were swallowed up.

There is a further ground for objection, which is that the material facts are all admitted in our answer.

Trial Examiner Norwood: Well, that is what I started to ask you. National has admitted acquiring various selfsame concerns, have they not?

Mr. Ewing: I have not checked to see that every one is in the answer, but the fact is that we have admitted it.

Mr. MacIntyre: I think there is an admission to the names of the companies that were acquired; but we are concerned here with more than just the companies. We are concerned here with parties who engineered these acquisitions.

Trial Examiner Norwood: Well, they admit owning certain specified numbers of shares in these various companies.

Mr. MacIntyre: But, if your Honor please, they do not admit that Thomas Fortune Ryan, one of the men
952 in the background of the history of the Anaconda Company, and that Daniel Guggenheim, one of the men in the background of the history of The National Lead Company and American Smelting and Refining Company, were personalities who got their heads together and formed these combinations, the start of which is this acquisition represented by the pending offer.

Mr. Ewing: Of course we do not admit any such thing. It was not the fact; and furthermore, the complaint does not allege that they did.

Trial Examiner Norwood: The complaint alleges a plan for a design.

Mr. Ewing: But it is not a plan by Messrs. Guggenheim and Thomas Fortune Ryan.

Trial Examiner Norwood: Well, it is broader than that, a plan by anybody that can be connected, if they can connect it.

I shall reserve the ruling on this.

Now, as I understand it, this document's identification is conceded.

Mr. Ewing: No question about that.

Trial Examiner Norwood: So we will take that and look it over, too.

You may proceed.

Mr. MacIntyre: I now offer into evidence document heretofore marked Commission's Exhibit No. 4, for
953 identification, being a photostatic record of the Minutes of the regular meeting of the Board of Directors of The National Lead Company held September 18, 1902.

Trial Examiner Norwood: Has that some lettered pages, or just one sheet?

Mr. Ewing: Just one page.

Mr. MacIntyre: In that connection, I refer Your Honor to Lines 16 through 23, on Page 21 of the record.

Mr. Ewing: If Your Honor please, I will object to this on the ground that it is wholly irrelevant and immaterial, as shown on its face.

Trial Examiner Norwood: How is that, Mr. Ewing?

Mr. Ewing: Well, it refers to certain material changes in connection with two plants, obviously of a minor nature. The reissuance of a dividend check and the appointment of an Executive Committee has nothing to do—

Mr. MacIntyre: But, if Your Honor please, the functions of that Executive Committee become all-important for The National Lead Company from that day on in its acquisitions of the other competing concerns.

Mr. Ewing: This particular exhibit has nothing to do with anything.

Trial Examiner Norwood: I will read it over. The ruling is reserved.

You may proceed.

954 Mr. MacIntyre: I now offer into evidence the documents heretofore marked for identification as the Commission's Exhibits 5-A through 5-F, inclusive, being photostats of the records of The National Lead Company, including agreements that it entered into and considered with Thomas Fortune Ryan and Daniel Guggenheim, and others.

Trial Examiner Norwood: Is there any objection?

Mr. MacIntyre: In that connection I will refer Your Honor to Lines 5 through 15 of Page 22 of the record.

Mr. Ewing: We object to it, Your Honor, on the ground that it is immaterial and irrelevant, and that so far as a hasty examination is concerned, there is no mention in this document of either of the gentlemen referred to by Mr. MacIntyre.

Trial Examiner Norwood: Do you have a duplicate of this?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: What about the paragraph that is struck out with red ink?

Mr. Ewing: That is out, as I understand it.

Mr. MacIntyre: That is not offered; but in the page—as you will note, that is in the upper third of the first page.

Trial Examiner Norwood: Yes.

Mr. Ewing: And there is a similar paragraph at
955 the very end that is out.

Trial Examiner Norwood: Well, I will read it.

Mr. MacIntyre: With reference to the statement just made by Mr. Ewing that there is no reference in this document to Thomas Fortune Ryan, and others that I have mentioned, I merely refer you to Line 4 of the page marked Commission's exhibit for identification 5-B.

Mr. Ewing: Well, I will withdraw my statement. I said that it was after a cursory examination, and I missed it.

Trial Examiner Norwood: Was this Anaconda Company connected with this matter?

Mr. Gardiner: If Your Honor please, there is no reference, on a cursory examination, to the Anaconda Mining Company, or any connection that Thomas Fortune Ryan might have had with that company. I do not wish to take the position of striking counsel's remarks; but we will object to the introduction of this, as having any relevancy, so far as the Anaconda Copper Mining Company, or the International Smelting and Refining Company is concerned, as Respondents in this case.

Mr. MacIntyre: We cannot connect everybody with one piece of evidence; but the record as a whole must be taken to do that.

If Your Honor please, I now offer into evidence a document heretofore marked for identification as Commission's Exhibit 6-A through 6-Q; and in that connection, I
956 will refer you to the record beginning at Line 25, Page 22, through Line 10, on Page 23, and state that this includes a record of the Minutes of the adjourned regular meeting of the Board of Directors of The National Lead Company on January 22, 1903.

Trial Examiner Norwood: Do you have copies of this?

Mr. Ewing: Yes, sir.

If Your Honor please, I will object to it on the same grounds that I objected to the other Minutes.

Trial Examiner Norwood: Are there any other objections?

Ruling reserved.

We will take a five minutes' recess.

(Brief recess taken.)

Trial Examiner Norwood: Come to order.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: If Your Honor please, might I extend my objection on the record with respect to Commission's Exhibit for identification 5-A through F, and the reference therein to the proposed contract, by calling to Your Honor's attention Exhibit 6-C for identification, wherein there is a recital that the Resolution authorizing the execution
957 of that contract was rescinded at the meeting of the Board, the adjourned regular meeting of the Board of Directors of January 22, 1903.

Mr. MacIntyre: If Your Honor please, that is just the reason it is necessary to offer the number of documents that we are offering, which is to get the whole story, because there were negotiations and discussions going on for a period of years, as to just how all of these acquisitions were to take place; and it is true that some of the proposals, as originally made, were not executed but were modified, and then acquisitions made under the modified terms of the contract.

Trial Examiner Norwood: Well, you may make the rest of your offers.

Mr. MacIntyre: If your Honor please, I now offer into the record Commission's Exhibit 7 for identification, which includes a record of the Minutes of the adjourned meeting of the Board of Directors of The National Lead Company of July 22, 1904.

Mr. Ewing: If your Honor please, I will make the same objection.

Examiner Norwood: Ruling reserved.

You may proceed.

Mr. MacIntyre: If your Honor please, I now offer into the record documents, marked for identification as Commission's Exhibit 8-A and 8-B, which includes a record
958 of the Minutes of the adjourned meeting of the Board of Directors of the National Lead Company of November 10, 1904.

Mr. Ewing: If your Honor please, I will make the same objection and in that connection I will refer your Honor to Page 24 of the record, which concerns the identification and authentication.

Of course, your Honor, we object in no case to the identity of these documents.

Trial Examiner Norwood: Ruling reserved.

Mr. MacIntyre: If your Honor please, I now offer into evidence documents heretofore marked for identification as Commission's Exhibits 9-A through 9-G, which includes a record of the Minutes of a certain meeting of the Board of Directors of The National Lead Company of February 13, 1906.

The record includes a showing of identification of that exhibit on Page 25, Lines 4 through 8.

Mr. Ewing: I will make the same objection, your Honor.

Trial Examiner Norwood: Ruling reserved.

Do you have any remarks to make regarding the objection, Mr. MacIntyre? It was objected to as irrelevant.

Mr. MacIntyre: If your Honor please, this document shows that there was finally put through the purchase by The National Lead Company of the United Lead Company, which included about 17 additional competing and independent concerns.

Mr. Ewing: The answer concedes that in February, 1906, National Lead acquired all of the stock of the United Lead Company, which, as we say in the answer, is engaged principally in the manufacture, sale and distribution of metallic lead alloy products and is not a competitor.

Trial Examiner Norwood: Ruling reserved.

Mr. MacIntyre: If your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 10-A and 10-B, which includes a record of the regular meeting of the Board of Directors of The National Lead Company of March 15, 1906.

Mr. Ewing: If your Honor please, I will object to it on the same ground, and on the further ground that the answer concedes the acquisition of stock in that company.

Mr. MacIntyre: And in that connection I will refer your Honor to Pages 25 and 26, beginning at Lines 16 to 25, which contains a showing of the identification and authentication of that document.

Trial Examiner Norwood: Does this point out anything further than what the pleadings have admitted.

Mr. MacIntyre: I think so.

Mr. Ewing: It also authorizes the purchase of the entire outstanding capital stock of Carter White Lead Company for the stated consideration of $1,275,000 par
960 value of debentured bonds of United Lead Company.

Trial Examiner Norwood: Ruling reserved on that.

Mr. MacIntyre: If your Honor please, I will now offer into the record documents heretofore marked for identification as Commission's Exhibits 11-A through 11-D, which includes a record of the Minutes of the adjourned meeting of the Board of Directors of The National Lead Company of April 19, 1906.

Mr. Ewing: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: If your Honor please, we objected to "A" on the ground that it is irrelevant; "B" on the ground that it appears on the face thereof that it is wholly irrelevant; and "C" and "D" on the same ground.

Trial Examiner Norwood: Ruling reserved.

Mr. MacIntyre: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

You want to meet, then, by 10:00 o'clock, city time, tomorrow?

After discussion with counsel, the request of Commission's counsel is granted that an adjournment be taken until 9:00 o'clock tomorrow morning, standard time.

961 The hearing in this case will now stand adjourned until tomorrow morning at 9:00 o'clock, standard time, which is 10:00 o'clock city time.

(Whereupon, at 11:50 o'clock a. m., Monday, June 24, 1946, the hearing in the above-entitled matter was adjourned, to reconvene tomorrow morning, Tuesday, June 25, 1946, at 10:00 o'clock a. m.)

962 Room 605, Bar Association Bldg.,
New York City, New York,
June 25, 1946.

Met, pursuant to adjournment, at 9:00 a. m., E.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N.W., Washington, D. C.), T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Dwight R. Collin, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

963 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

964 Proceedings.

Trial Examiner Norwood: Come to order. Pursuant to adjournment on yesterday, the hearing on docket 5253 is reconvened at 9 o'clock a. m. Eastern Standard Time on the 25th day of June, 1946 in the trial room of the Bar Association Building at 36 West 44th Street, New York, N. Y. Let the record show the following appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin-Williams Company.

Dwight R. Collin, Esq. (Chadbourne, Wallace, Parks & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company. Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

965 Now on all these exhibits that were offered yesterday, the ruling was reserved until I could study them: Commission's exhibit for identification 797-A to Z-6 exhibit 533; 534; 535, 577-A, 577-B, 577-C; 3-A through 3-Y. Commission's exhibit 4 for identification; 5-A to 5-F inclusive; 6-A to 6-Q; 7; 8-A, 8-B; 9-A to 9-G inclusive; 10-A, 10-B; and 11-A to 11-D.

The objection is overruled and they are received in evidence.

(The papers referred to, herefofore marked for identification "COMMISSION'S EXHIBIT NOS. 797-A, 797-B, 797-C, 797-D, 797-E, 797-F, 797-G, 797-H, 797-I, 797-J, 797-K, 797-L, 797-M, 797-N, 797-O, 797-P, 797-Q, 797-R, 797-S, 797-T, 797-U, 797-V, 797-W, 797-X, 797-Y, 797-Z, 797-Z-1, 797-Z-2, 797-Z-3, 797-Z-4, 797-Z-5, 797-Z-6; 533; 534; 535; 577-A, 577-B, 577-C; 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-X, 3-Y; 4; 5-A, 5-B, 5-C, 5-D, 5-E, 5-F; 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, 6-I, 6-J, 6-K, 6-L, 6-M, 6-N, 6-O, 6-P, 6-Q; 7; 8-A, 8-B; 9-A, 9-B, 9-C, 9-D, 9-E, 9-F, 9-G; 10-A, 10-B; 11-A, 11-B, 11-C, 11-D" were received in evidence.)

Trial Examiner Norwood: There are some cost studies there that these first exhibits tie up with and I imagine
966 that all these documents go to the purpose and that

they are additional information as to what has been admitted. And I believe the cost studies will be valuable to both sides and will be useful to both sides.

Mr. Ewing: I would like to say that they are not the cost studies of any respondent here.

Trial Examiner Norwood: Aren't they the studies of National Lead?

Mr. Ewing: No, sir.

Trial Examiner Norwood: What are they the studies of?

Mr. Ewing: The studies of DuPont.

Mr. MacIntyre: But they are studies of cost factors that were used as a basis for dealings with the respondent, National Lead Company.

Mr. Ewing: They weren't used by National lead though.

Mr. MacIntyre: They served as a basis for the dealings of the contracts which are included.

Mr. Ewing: They served as no basis whatever for anything.

Trial Examiner Norwood: Well, these are all subject to substantial connection. Of course, throughout this whole thing this must be the case. They are received in evidence. Proceed.

967 Mr. MacIntyre: If your Honor please, before going ahead with the witness this morning I want to offer in evidence a document heretofore marked for identification as Commission's exhibit 92 as a report to the stockholders of the American Smelting and Refining Company made by a stockholders committee investigation on May 10, 1922.

Mr. Ewing: I will object to that on the ground that there has been no background laid for it by which to determine whether it is relevant, material or competent.

The report of the stockholders of the American Smelting and Refining is not a party to this case and does not involve any respondents purely hearsay with respect to any respondents.

Mr. MacIntyre: If your Honor please, there is considerable background material in that document concerning the activities of the members of the Board of Directors of the National Lead Company; namely, Mr. Daniel Guggenheim and others of the Guggenheim family.

And it shows what their purpose was in moving as they did in making these acquisitions during the early years of this country as I disclosed by the exhibits you have just received in evidence.

I submit, your Honor, the document is wholly incompetent as far as each and every respondent is concerned and as far as anything that now appears in the
968 record is irrelevant. Certainly that is not proof by introducing hearsay material that is prepared by some other company's representatives. You might just as well prove it by a newspaper.

Mr. Collin: On behalf of the Anaconda Copper Company, I wish to join in Mr. Ewing's objection.

Trial Examiner Norwood: This Commission's exhibit—

Mr. MacIntyre: The Secretary of the American Smelting and Refining Company was on the stand and identified that through oral testimony subject to which he was subjected to cross-examination, his identification having taken place beginning at page 65 of the record.

It was Mr. Brockington, the Secretary of that corporation.

Mr. Ewing: Of course, we don't dispute that he identified it, your Honor, but still that doesn't make it competent evidence against us.

Mr. MacIntyre: It is a record that was made in the regular course of an investigation of that company and includes historical material of the background going back to 1891.

Mr. Ewing: How you can say that it is a record made in the regular course of the business of that company is more than I can see. It is entitled, "A Report to Stockholders of the American Smelting and Refining Company by the Stockholders Committee of Investigation."

Now the circumstances of the appointment of the
969 Committee and the background, none of these things appear. And I say we might just as well attempt to make proof of that material by offering newspapers.

I submit that it is going much too far.

Mr. MacIntyre: If your Honor please, I would just like to make this observation. The factual material set forth therein has been subjected to the tests of a review by the late Chief Justice Taft of the United States Supreme Court and other eminent people in the legal profession acting as judges for the benefit of not only the stockholders at large of the American Smelting and Refining Company, but of Mr. Daniel Guggenheim who was the moving spirit behind the organization of the National Lead Company, the respondent here.

Trial Examiner Norwood: I don't know that that would make it relevant in this case.

Mr. MacIntyre: The activities of the man who organized the principal respondent in this case and the purpose for which he organized it doesn't make it relevant.

Trial Examiner Norwood: I wouldn't think of ruling on this at this time until I examined it.

Mr. MacIntyre: I would ask you to take it under advisement.

Trial Examiner Norwood: I will have to reserve my ruling on that. Commission's exhibit 92 being securely bound and having 142 numbered pages and entitled,
970 "A Report to the Stockholders of the American Smelting and Refining Company" is offered in evidence and the ruling is reserved on it. Proceed.

Mr. MacIntyre: Now, if your Honor please, I offer into the record Commission's exhibit heretofore marked for identification as 22-A to Z-47 as a statement. 47—it is a historical statement of the organization and the operations, American Smelting and Refining Company and its subsidiaries and containing a showing of its connections with the formation and start of the respondent, National Lead Company.

That document was marked for identification in the record and identified by the Secretary of the American Smelting and Refining Company, Mr. Brockington.

Brockington, beginning at page 35 of the record. I want to call your Honor's attention to the fact that this is an ancient document and it therefore is entitled—we are entitled to have applied to all the rules of evidence that would apply to an ancient document of a historical nature.

Trial Examiner Norwood: It goes to identification.

Mr. MacIntyre: No, it goes beyond that. It was prepared as shown by oral testimony in 1912 by responsible officials of the American Smelting and Refining Company and as a statement of its history. I want to say that this offer as well as the immediately previous one are of-
971 fered in connection with the charges contained in subparagraph 8 of paragraph 7 as it appears on page 5 of the mimeographed copy of the complaint relating to the relationship of the National Lead Company and the American Smelting and Refining Company.

There is a charge of conspiracy in a sense and when you have competent evidence and especially of this form going

back into the history of the relationship, there is nothing that can be more competent—that is unless we had the man who prepared this here to testify and that is something we can't do because he is dead.

Mr. Ewing: Might I just have a moment before making my objection?

Trial Examiner Norwood: Yes, certainly. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: I object to the receipt in evidence of this document or series of papers which are marked Commission's exhibits 22-A to 22-Z inclusive and form part, as I understand it, Commission's exhibit 24.

Trial Examiner Norwood: That goes from A to Z 47?

Mr. Ewing: That's right. I think your Honor should be advised that these same exhibits were offered before Judge Ballinger in Washington on May 16th and the
972 same arguments were urged by the Commission's attorney to support his argument that they should be received and Judge Ballinger rejected it.

I direct your attention to pages 511—

Trial Examiner Norwood: (Interposing.) I shall examine it de novo.

Mr. Ewing: I just want to direct your attention to pages 511 and 522 inclusive in which the objection finally appeared. We object to these documents upon the ground that they are incompetent, irrelevant, and immaterial.

They are hearsay as to every one of the respondents. They are prepared by no one of the respondents and they have no connection with any of the respondents.

As a matter of fact, they are not an official record of the American Smelting and Refining Company but the record shows that they were prepared by a clerk or some one on his own responsibility in that office, all of these grounds having been stated before and in order not to encumber the record I would like to make reference generally to the objections which I stated on May 16th and which appear in pages 511 to 522 of the record.

Mr. MacIntyre: The clerk that Mr. Ewing refers to was Mr. Earl who held the position and his last position with the company was vice-president and general counsel.

Mr. Ewing: He wasn't that when he prepared the
973 statement.

Trial Examiner Norwood: There is nothing being offered here as evidence against American. The question is whether such a relation is shown between National and American as would justify the records of these transactions of American being used as evidence against National.

Mr. MacIntyre: That is right.

Mr. DuBose: May I say, your Honor, that there is no proof here that that record was a company record and prepared in the ordinary course of business. It was not a company record.

The testimony was that it was prepared for the man's own use.

Mr. MacIntyre: The testimony is that it was prepared for the use of the company in its organizations and it has been referred to for more than 30 years as such in the offices of that company. And, if your Honor please, I want to refer you to a manner in which it has been used.

I will refer you to exhibit 92—Mr. DuBose—

Mr. DuBose: (Interposing.) For identification?

Mr. MacIntyre: On page 48, there is a quotation.

Trial Examiner Norwood: Don't read it.

Mr. MacIntyre: I am not going to read it. There is a quotation from the record showing that all the stockholders of the company were informed that the company was
974 relying in part upon the information contained in Commission's exhibit for identification A to Z 47 for matters touching on the organization and history of the company.

Mr. Ewing: I think that insofar as counsel's statement—

Trial Examiner Norwood: (Interposing.) Commission's exhibits 22-A to Z-47 is what you meant to say; wasn't it?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: You left out the number 22.

Mr. Ewing: I think insofar as counsel's last statement refers to exhibit 92 which is not in evidence should be stricken. I understand that we should not attack each other's statements but I think it is wholly improper to base his argument on an exhibit which is not in evidence.

Mr. MacIntyre: That is just one of the many connections that are contained in there.

Mr. Ewing: I want to call your Honor's attention to the fact that Mr. Brockington, the witness who was called and identified this document, when asked who had pre-

pared the document testified that the man who prepared it, Earl, I think his name was, was a member of the legal department and was not an officer of the company.

And Mr. Brockington testified that he had not compared it with the other record books of the company and this
975 document 22-A to Z-47 correctly set forth anything from the official records of the company.

Mr. MacIntyre: That is one of the difficulties that we have run into in connection with ancient documents and that is the reason for the rules of evidence touching on ancient documents.

Mr. Ewing: You might just as well offer the newspapers.

Mr. MacIntyre: Ancient newspapers may be offered for the purpose of showing historical facts.

Trial Examiner Norwood: Well, I want to know, Mr. MacIntyre, what your opinion is to this one point. How are these transactions as stated here by and concerning American connected with National to such an extent that they may be used as evidence against National? Are you going to make the connection later or just what are you going to do?

Mr. MacIntyre: I would like to answer that question after I make the offer of the next two exhibits.

Trial Examiner Norwood: Well, go ahead and offer them because I am reserving the ruling on that one. Proceed.

Mr. MacIntyre: If your Honor please, I now offer into the record a document heretofore marked for identification as Commission's exhibit 93-A to 93-I inclusive and 94-A through 94-G inclusive, they being photostats of two con-
tracts which were entered into between American
976 Smelting and Refining Company and the respondents National Lead Company; one of them on February 26, 1906 and the other on March 16, 1906, whereby those two companies with respect to their dealings fixed the price of pig lead for a period of 15 years.

The identification of these documents began on page 68 of the record having been produced from the office and identified by an officer of the American Smelting and Refining Company as contracts that the company had executed with respondent, National.

Now I want to say this that when you take this other background material in the pending offer as well as the

background material in the form of the minutes of the meetings of the Board of Directors of the respondent, National Lead Company, which are now in evidence and consider the pending contracts in the light of that it becomes somewhat clear. I don't say it is clear as it will be when closed here—that the Guggenheim family and the managers of the syndicate which controlled the National Lead trust up to 1891 when it became the National Lead Company, proceeded with a plan and purpose to eliminate competition in the production and sale of lead products and that these historical documents show that as a step in the execution of that plan they formed these combinations, the small group of men formed these combinations now represented by the American Smelting and Refining Company and the respondent, the National Lead Company, and
977 then proceeded to have the two to enter into contracts for the fixing of a price on pig lead in New York City for a period that takes in a majority of the time between the time those corporations were formed and the present date.

When you consider all of those facts in the light of not the admission but the contention made here by representatives of the National Lead Company that the quotation in New York City on pig lead is an important and if not a controlling factor in fixing the price of the lead pigments which are in issue in this case when the relevance and the materiality of all these documents is certainly shown.

And in that connection I call your attention further to sub-paragraph D, of paragraph 8 of the complaint appearing on page 9 of the mimeographed form.

Trial Examiner Norwood: What does it state?

Mr. MacIntyre: The allegation that in offering for sale and selling dry red lead, litharge and other lead pigments, each respondent offers to sell red lead at $2.50 and litharge at $1.50 per 100 pounds over the American Smelting and Refining Company closing price of common pig lead at New York on the date the order is received.

Now you will find in documents now pending, 93 and 94, provisions which are in keeping with that charge of the complaint. Other exhibits have been received and they are in keeping with the contentions made by counsel for
978 the National Lead that the price of pig lead is not only influential and important if not controlling with respect to the fixing of the price on these lead pigments.

Mr. Ewing: I would like to make my own contentions without Mr. MacIntyre's help sometimes. I object to these documents on the grounds that they are irrelevant and immaterial.

They are contracts long since expired and not covering the greater part of the period between 1891 and today, and 15 years from 1906 to 1921 by which National purchased from the American Smelting and Refining Company.

They have nothing to do with litharge charges which are in the complaint. Litharge and red lead and not to be purchased by National of pig lead. As I say the contracts expired long ago and have no possible bearing on the situation.

Mr. MacIntyre: It is our contention that while the period specified in the contracts has passed, that the effectiveness of the agreement entered into and as expressed by the contract has continued with respect to the relationship of these two companies.

Mr. Ewing: Well, if that is the basis of the offer I suggest that he prove that fact first.

Mr. MacIntyre: We have to start first by showing how it arose.

Mr. Ewing: Start first by giving the competent back ground of the evidence.

979 Trial Examiner Norwood: I will have to reserve my ruling on that. Proceed.

Mr. MacIntyre: I want to say that we have quite a number of additional contracts which have been entered into between the respondent, National Lead Company, and the American Smelting and Refining Company pursuant to the terms of which the price of pig lead was fixed.

It covers a period running through the 30's and down into the 40's. Now we are not offering those at this time because we have witnesses waiting and it is going to take a long time to get through with the offers on those and I am going to withhold them for a later period in the hearings here and if Your Honor cares to do so, I certainly wouldn't urge you to do otherwise than to hold the pending offers until the additional ones can be included.

Trial Examiner Norwood: I am not going to rule on them until I know what they are.

Mr. Ewing: I take it that counsel's descriptions and characterizations both with respect to the offer of 93 and 94

and his last statement are in no way binding on the respondent?

Trial Examiner Norwood: Counsel's statement is not considered evidence.

Mr. Wright: Your Honor, we would like to recall to the stand Mr. Robert Dunn.

980 Mr. MacIntyre: If Your Honor please, before the witness is sworn, I would like to make this statement for the record and it is in response to a statement that Mr. Ewing made concerning rulings that Mr. Ballinger made on some of the pending exhibits.

My statement is this that Mr. Ballinger did not have before him as much of a record upon which to base his consideration of these exhibits as you now have and, in fact, you will have a better record before it is closed than you have today.

I just mention that as one possible factor that could enter into the consideration of the admissibility of the exhibits.

Trial Examiner Norwood: I am approaching the problem with an open mind and I shall give it a complete restudy.

ROBERT DUNN was recalled by the Commission and after having been duly sworn testified further as follows:

Direct Examination (Continued) by Mr. Wright.

Q. I believe you already testified, Mr. Dunn, in the record, that you made an investigation of various of the respondents in this matter?

A. I did.

Q. And in that connection, conferred with and went through the records of a number of responsible officials
981 of the respondents?

A. I did.

Q. I show you a document which is a photostat of Commission's exhibit 723 which has already been received into evidence (showing to witness); do you recognize that?

A. I do.

Q. I believe you testified on February 21, 1945 that that exhibit was handed you by Mr. Shindler of the Sherwin-Williams Company?

A. That's correct.

Q. Did you at the time of your former testimony state that that document was in the handwriting of Mr. Shindler?

Mr. Welch: I object, the record shows what he stated.

By Mr. Wright:

Q. Do you recall what you stated in your previous testimony?

A. It is marked the Shindler exhibit F and I probably stated—

Mr. MacIntyre: (Interposing) I move to strike the answer as not responsive.

Trial Examiner Norwood: This witness has testified heretofore?

Mr. Wright: Yes.

Trial Examiner Norwood: And he is asking him what he testified heretofore?

Mr. Wright: Yes.

982 Trial Examiner Norwood: I think he has the right to do that, certainly. The objection is overruled.

A. I testified that it was given to me by Mr. Shindler. If I said it was Mr. Shindler's handwriting that probably is not correct. It was handed to me by Mr. Shindler who had an assistant working with him.

I asked for freight rates and Mr. Shindler and the boy who was working with him cooperated and supplied me with the information I asked for. This photostatic copy of this handwriting—the handwriting appears to be of the assistant rather than of Mr. Shindler.

Q. Then if you testified prior to this time that it was in Mr. Shindler's handwriting, then it is incorrect?

A. That is incorrect. It is in the handwriting of the assistant who gave it to Mr. Shindler who gave it to me.

Q. Mr. Dunn, I show you a photostatic copy of Commission's exhibit 647 and I ask you to state if you have ever seen that before (handing to witness)?

A. I have.

Q. Where did you see it?

A. That is a photostatic copy of a copy of a letter which I obtained at the office of the National Lead Company. Mr. Harold Rowe had permitted me to see certain files and correspondence that I thought I might be interested in was laid aside and I discussed it with Mr. Rowe to having

983 copies made to which he objected, but he said he would be glad to have copies made.

This is a photostatic copy of a copy that he furnished me with.

Q. Was that paper found in the files of the National Lead Company?

A. It was found in the files of the National Lead Company and extracted from the folder by me, laid aside and discussed with Mr. Rowe later.

Q. Mr. Dunn, I show you a document marked for identification—

Trial Examiner Norwood: (Interposing.) Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's exhibit 614-A through Y, and I ask if you recognize it (showing to witness)?

A. I do.

Q. Where did you last see that document?

A. I probably last saw it when I prepared the files to send to Washington and I included it in the files then.

Q. It was in your possession then?

A. I was the one.

Q. Where did you obtain that document?

984 A. I called at the DuPont Company and talked with Mr. Richter of that company and discussed the various angles of this case and I asked if I could see correspondence between—

Q. (Interposing.) What is Mr. Richter's full name if you recall and what was his position with the DuPont Company?

A. I don't recall whether it was Harry.

Q. Do you recall what his position was with the company?

A. He was the manager or the general manager of a division—they have so many divisions down there—having to do with the paint division under whom was a Mr. Sintel who was in direct charge of paint and pigment I believe they call it.

Mr. Richter—I don't know if he was called a general manager of the division—but he was over Mr. Sintel who was in charge of the paint and pigment division.

Q. Do you recall about when it was when you called on Mr. Richter?

A. I would say it was in the summer. I would say probably July of 1943. It was July 16th I see by my identification marks when I talked to him. It was in 1943.

Q. I understood you to say that that document was handed you by Mr. Richter?

A. I asked Mr. Richter if I could see the files between his company and various other rollers of white lead and he took me into another room, a file room, and allowed me to inspect any files there that I cared to. I saw this 985 paper and several other papers.

Some of them did not have extra copies and he had copies made for me. This one appears to have been one that was an extra copy and he said I could take it and it was extricated by me from the files of the DuPont Company.

Q. Will you tell us all you know about that document, any representations that were made to you at the time about it?

A. I have read it over but it says it is a white lead contract with the National Lead Company and it is a very detailed arrangement about how they would corrode the white lead and oil.

As I recall, the DuPont Company furnished the lead.

Mr. Ewing: I move to strike the answer on the ground that it is not responsive and on the further ground that the documents speak for themselves and the witness' comments is improper.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the question and answer as follows:

"Q. Will you tell us all you know about that document, any representations that were made to you at the time about it?"

"A. I have read it over but it says it is a white lead contract with the National Lead Company and it is a very detailed arrangement about how they would corrode 986 the white lead and oil.")

Trial Examiner Norwood: He hasn't quoted from the paper.

Mr. Ewing: He made an effort.

Trial Examiner Norwood: He asked him what it was, didn't he?

Mr. Ewing: I submit that the document speaks for itself. As a matter of fact, my recollection of it is that there is nothing in it about having National corrode the lead.

Trial Examiner Norwood: The document does its own speaking about something else. It doesn't speak—

Mr. Ewing: (Interporsing.) The witness was saying what it is.

Trial Examiner Norwood: The objection is overruled.

The Witness: The question was what representations were made to me about this paper?

Mr. Wright: Yes, that's right.

The Witness: I asked Mr. Richter about this paper and he gave no detailed explanation saying that this was a copy and I could have it for what it was worth to me.

He did not give any detailed explanation to me as to what the paper was and what purpose it served.

Mr. Wright: Your Honor, I would now like to have some documents marked for identification by the re-
987 porter. I believe the next number will be Commission's exhibit 798-A, through 798-Z-13.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Mark those as Commission's exhibits 798-A through 798-Z-13.

(The documents referred to were marked Commission's Exhibits 798-A, 798-B, 798-C, 798-D, 798-E, 798-F, 798-G, 798-H, 798-I, 798-J, 798-K, 798-L, 798-M, 798-N, 798-O, 798-P, 798-Q, 798-R, 798-S, 798-T, 798-U, 798-V, 798-W, 798-X, 798-Y, 798-Z, 798-Z-1, 798-Z-2, 798-Z-3, 798-Z-4, 798-Z-5, 798-Z-6, 798-Z-7, 789-Z-8, 798-Z-9, 798-Z-10, 798-Z-11, 798-Z-12, 798-Z-13 for identification.)

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Dunn, I believe you testified before that you conducted an investigation of the Glidden Company?

A. That's right.

Q. Do you recall about at what time that occurred?

A. I called on Glidden twice. One time would probably be in the early summer of 1943 and I returned to Glidden in December—I know it was pretty close to just a few
988 days before Christmas of 1944 probably or 1945.

Q. On the occasion of those visits did you confer with responsible officials of the Glidden Company?

A. I did. I first contacted Mr. Sprague who is a vice-

president of the company in his office downtown at the Union Trust Building at 19th and Euclid and he referred me to Mr. Radloff who is the sales manager and through Mr. Radloff, a Mr. Cole who I believe is the comptroller and a man in charge of the traffic department—I can't think of his name at the minute because it slips my mind right now.

Q. At the time of your investigation did you examine the files and the records of the Glidden Company?

A. I did.

Q. Did you secure certain documents from those files at that time?

A. Oh, a number of documents such as price cards and circulars and correspondence and invoices.

Q. I hand you herewith documents marked for identification Commission's exhibits 798 to Z-13 and I ask you if you can identify them (handing to witness)?

A. Yes. These are office copies of invoices from the Glidden Company which were obtained by me in the office of the Glidden Company in Cleveland and given to me by Mr. Cole. I assisted him in obtaining these invoices.

Q. Were these given to you as records of the Glid-
989 den Company of transactions covering lead pigments?

A. They were.

Mr. Wright: Your Honor, I offer Commissioner's exhibits 798-A through Z-13 in evidence.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hinds: Rather than run the risk that Mr. MacIntyre will not be able to make good his hopes about it, we will ask the reporter to make copies of it at the Glidden Company's expense.

We think it is a very expensive thing but we can't safely do anything else. Will the reporter make photostatic copies of these and charge it to the Glidden Company's expense? I have no objection.

Trial Examiner Norwood: Is there any other objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: They are received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 798-A, 798-B, 798-C,

798-D, 798-E, 798-F, 798-G, 798-H, 798-I, 798-J, 798-K, 798-L, 798-M, 798-N, 798-O, 798-P, 798-Q, 798-R, 798-S,
990 798-T, 798-U, 798-V, 798-W, 798-X, 798-Y, 798-Z, 798-Z-1, 798-Z-2, 798-Z-3, 798-Z-4, 798-Z-5, 798-Z-6, 798-Z-7, 798-Z-8, 798-Z-9, 798-Z-10, 798-Z-11, 798-Z-12, 798-Z-13, were received in evidence.)

Mr. Wright: I have no further questions of this witness.

Trial Examiner Norwood: Is there any cross-examination?

Mr. Ewing: I have no cross-examination.

(Witness excused.)

991 Mr. MacIntyre: I will call Mr. Wormser.

FELIX E. WORMSER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre

Q. Will you give your name and address to the reporter?

A. Felix E. Wormser, 420 Lexington Avenue, New York City.

Mr. MacIntyre: Before we proceed further with questions of the witness, I would like to ask Mr. Ewing a question concerning Commission's Exhibit for Identification 506-D, E, and L.

Mr. Ewing, that is a photostat of a letter that was sent, the original of which was sent by Mr. Carter to Mr. Richter of the du Pont Company, with this signed copy going to Mr. Wormser, is that correct?

Mr. Ewing: That is the fact.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

You may proceed.

By Mr. MacIntyre:

Q. Mr. Wormser, you are the Secretary of the Lead Industries Association?

992 A. Yes, sir.

Q. And you are the same person who appeared and testified in this case on January 16, 1945, here in New York, is that correct?

A. I believe that was the date; yes, sir.

Q. You have received from the Commission, requiring you to produce here today, a subpoena duces tecum, in which there are certain specified documents called for?

A. I do not believe it called for any documents, sir—just a plain subpoena.

Q. I am talking about the white document, such as you produced the last time you were on the stand, a document similar to that, requiring you to produce certain documents.

A. That is all I have received, sir. It does not call for anything that I can see.

Trial Examiner Norwood: This is a simple subpoena.

Mr. MacIntyre: Yes, there were two subpoenas sent to Mr. Wormser. The first one was an ad testificandum, and that is the one your Honor holds. The second one was served from the Records Division in Washington, calling for a production of documents.

Mr. Ewing: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

993 You may proceed.

By Mr. MacIntyre:

Q. Do you think that it is probable that some clerk in your office accepted service of the subpoena without notifying you, that is, the duces tecum?

A. I don't think that is true.

Q. It would have been by registered mail?

A. It would have been by registered mail, sir.

Q. Well, during the noon hour, will you inquire of your staff to determine whether that has been done?

A. I will be glad to do that, sir.

Mr. MacIntyre: Mark this as Commission's Exhibit No. 515-H2.

(The paper referred to was marked Commission's Exhibit 515-H2 for Identification.)

By Mr. MacIntyre:

Q. When you were on the stand the last time, Mr. Wormser, you produced a number of documents in response to a subpoena duces tecum which had been served on you, do you recall?

A. Yes, sir.

Q. One of those documents which you then identified, or one series of those documents which you then identified, had been marked for identification as Commission's Exhibits 515-A thru 515-K.

I now show you a document marked for identification as Commission's Exhibit 515-H2, and I ask you if
994 that is one of the original documents which you submitted at that time, and which the reporter did not get marked in regular order?

Mr. Ewing: Would you mind clarifying what you mean by "did not get marked in regular order"?

Mr. MacIntyre: Well, the documents in the group were marked "A" thru "K", and this document followed "H".

Mr. Ewing: And it is given a numeral because it was omitted? I see.

Mr. Wright: It was not marked.

Mr. Ewing: I see.

The Witness: Mr. MacIntyre, this appears to be part of the files that I gave you on January 16th.

Mr. MacIntyre: Yes.

The Witness: That is all I can say about it, sir.

By Mr. MacIntyre:

Q. And in the group of letters which have heretofore been marked for identification as Commission's Exhibits 515?—

A. (Interposing.) That's right, sir.

Q. And being a part of the files, it was taken from the offices of the Lead Industries Association and brought to the hearing, in response to a subpoena duces tecum which had been served on you?

A. That is right, sir.

Q. Well, how can you account for a document of
995 that kind being in the files of the Lead Industries Association?

Mr. Ewing: I will object to the form of the question.

Trial Examiner Norwood: Can you account for it?

The Witness: I would like to refresh myself about this particular episode. This was back in 1933, and it is 13 years ago. I haven't seen this until this moment.

Trial Examiner Norwood: I will sustain the objection to the original question. You may ask him another one.

By Mr. MacIntyre:

Q. Can you account, then, for the presence of that document in the files of the Lead Industries Association.

Refresh your memory and recollect it, as far as you feel that it is necessary for you to do so.

Mr. Ewing: I will object to the form of the question again. The witness should not be called upon to account for anything. He can tell, if he knows, how it got into the files of the Lead Industries Association.

Trial Examiner Norwood: I think that is the substance of his query.

The objection is overruled.

The Witness: Well, apparently this all relates to code days, on the second draft of our Lead Code; but I would have to study this and try to refresh my memory as to what transpired back in 1933, before I could give you
996 an accurate answer, Mr. MacIntyre.

By Mr. McIntyre:

Q. Well, in so far as you can, will you do that?

The Witness: Your Honor, this appears to me to be a letter which Mr. Willard Maston, who was then Chairman of our Lead and Oil Division in the preparation of certain sections of the Lead Code, wrote to Mr. Case, in an effort to meet Mr. Case's objection to the draft as it was then drawn; and he sent me a copy of it, apparently, so that I would be upholstered with Mr. Case's objections.

By Mr. MacIntyre:

Q. And you, as a part of the conduct of your office, as Secretary of the Lead Industries Association, placed it in your files there?

A. That is correct, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

You may proceed.

By Mr. MacIntyre:

Q. Mr. Wormser, I believe you testified, when you appeared before, that you have been with the Lead Industries Association since November 1928.

A. Correct, sir.

Q. And that was the date of its organization?

997 A. Right, sir.

Q. Could you tell us whether the Association is an incorporated or an unincorporated Association?

A. It is unincorporated.

Q. And as a trade association for those who produce, sell and distribute lead pigments?

A. I would say who mine, smelt, refine, and manufacture lead and lead products.

Q. Including lead pigments?

A. Including lead pigments.

Q. Throughout the period of time that you have been Secretary of the Association, has The National Lead Company been a member?

A. The entire period, sir.

Q. What representative of The National Lead Company, do you recall, as having represented that company in its membership in the Lead Pigments Division of your Association?

A. Going back to 1928, Mr. MacIntyre?

Q. Yes, any of them since that period, that you can recall.

A. As a matter of fact, Mr. MacIntyre, if memory serves me correctly, in the early days our white lead pigment end of it was rather dormant, and it was only in the code days that we had an active group of white lead companies, and at that time Mr. Carter, Fred M. Carter, Vice-President of The National Lead Company, rep-
998 resented the National Lead Company, as near as I can recall.

Q. Through what period of time, do you recall him as being a representative of The National Lead Company in your Lead Pigments Division?

A. I would say during the code years. I have forgotten just when that started, but I would say around '32, '33, and '34.

Q. Do you know to what date?

A. Oh, I would say that the day of the Schechter decision of the NRA days. After that, it became inactive. It was only in the last, I would say, around 1937 or '38, when we were doing some promotional work in the way of national advertising to stimulate the use of white lead, that our white lead people became active again.

Q. Did Mr. Carter continue to represent National?

A. Mr. Carter then had retired.

Q. Who replaced him, if you recall?

A. Mr. Harold Rowe became active at that time.

Q. And he has continued to represent them?

A. He has continued to represent the National Lead.

Q. That was from what date?

A. Oh, I would say it was in the late '30's, as near as I can judge.

Q. Well, it is since the date of the retirement of Mr. Carter?

A. Yes, except that we were very inactive during
999 that period, Mr. MacIntyre. As I recall, we had practically no meetings; and all we did at that time—well, we did meet—but all we did was to discuss promotional activities.

Q. Well, had such meetings as you had, and had such activities as National carried on with you, during all of those meetings and activities Mr. Carter represented National down to the date of his retirement, and from that date on it has been Mr. Rowe, is that correct?

A. I think that is a fair statement, Mr. MacIntyre.

Q. Now, from your recollection, will you state who represented Eagle-Picher, in the Lead Pigments Division of your Association?

Mr. Ewing: I do not want to interrupt the proceedings, but I think I will object to this line of inquiry on the ground that it is not the best evidence and that the records are in fact available and have been identified, which would show exactly what representation was in this company.

Trial Examiner Norwood: I do not think that is subject to the best evidence rule. He should tell what he knows about it, if he knows.

Mr. Ewing: I submit that what he knows is immaterial. The fact is what the records of the Association show, with respect to its membership.

Trial Examiner Norwood: No, he can testify as to who belonged to it. That is, during his tenure of office. I will overrule the objection.

1000 The Witness: As I recall, at the start back in '28 and '29, Mr. R. M. Roosevelt, Vice President of the Eagle-Picher Lead Company, then represented White Lead Pigment Industry, but during Code days, Mr. Willard Maston, of the Eagle-Picher Lead Company, represented his company; and subsequently Mr. Maston died.

By Mr. MacIntyre:

Q. I don't recall.

A. About what year?

Q. Just a guess, Mr. MacIntyre—it would be around

1935 or '36. I must confess I am dubious as to just what year it was.

Mr. Seryiss: I think around the spring of 1938.

The Witness: And thereafter, Mr. Hayt, Mr. William Hayt, one of the officers of the Eagle-Picher Lead Company, represented the white lead and oil activities of Eagle-Picher.

By Mr. MacIntyre:

Q. And replaced the representation of Mr. Maston, just as Mr. Rowe had Mr. Carter?

A. That is right.

Q. And has continued since that date?

A. And has continued since that date.

Q. I don't think I asked you this previously: Eagle-Picher has been a member of your Association since November, 1928; is that correct?

1001 A. Correct.

Q. Has Anaconda maintained a membership in your Association since November, 1928?

A. Not Anaconda, sir; it is the International Smelting & Refining Company.

Q. In other words, Anaconda's interest has been represented in the Association through that latter company?

Mr. Collin: I object to the characterization of counsel.

Trial Examiner Norwood: Objection sustained.

He can tell you any facts to show a connection between the activities of the Association and Anaconda; for instance, paid their dues, or something like that. He can show that; but you are just asking him for an opinion.

You may proceed.

By Mr. MacIntyre:

Q. To your knowledge, did Anaconda have any representative at any meetings of your Association?

A. During Code days, Mr. F. O. Case represented the International Smelting & Refining Company.

Q. To your knowledge, did he represent any interests of Anaconda?

A. He represented Anaconda White Lead.

Q. And for what period of time?

A. That was also during Code days.

1002 Q. Do you recall whether anyone, in addition to Mr. Case, represented Anaconda Copper?

Mr. Collin: Your Honor, I would like to know whether

Mr. MacIntyre is referring to a product or to a company here, when he says "'represented Anaconda". Does he mean the respondent Anaconda Company? Does he mean the product, Anaconda White Lead? Or what does he mean? I think the record should be a little clearer than it is now.

Trial Examiner Norwood: Well, he can testify to the general fact, if he knows it. Then that can be clarified.

Objection overruled.

By Mr. MacIntyre:

Q. Mr. Wormser, I show you documents heretofore marked for identification as Commission's Exhibits 498-A and 499-D; and I will ask you, if you need to, to refer to those documents to refresh your memory and recollection, and then state whether or not that Anaconda Sales Company was represented by anyone at your meetings, or in any capacity in your Association?

A. That's right, sir, the Anaconda Sales Company.

Q. And over what period of time?

A. 1935, 1936, 1940, 1941, 1942, '43, and '44.

Q. Who represented Anaconda during that period of time?

A. Well, on the Board of Directors of the Association, Mr. Clarence Glass.

Q. Of the Anaconda Company?

1003 A. Of the Anaconda Sales Company.

Q. Now, will you please help us, as much as you can; in giving us the period of time that Mr. F. O. Case represented the company in the Association?

Mr. Collin: What company, Your Honor?

Trial Examiner Norwood: Clarify that, please. Do you mean the Anaconda Company?

Mr. MacIntyre: I mean any interest of the Anaconda Mining Company, which is the respondent here, or any of its subsidiaries.

Mr. Ewing: Then I object to the form of the question.

Trial Examiner Norwood: Read the question, please.

(The reporter read the question, as follows:)

"Now, will you please help us, as much as you can, in giving us the period of time that Mr. F. O. Case represented the company in the Association?"

Trial Exaimner Norwood: I will ask the witness to answer that question as it was last read there, not as it

was explained. I would permit the question, if you consider that it is amended by your explanation there, because, as was pointed out, it broadens it in a confusing way.

Mr. MacIntyre: It is acceptable to me for him to answer it either way.

Mr. Collin: I will object to the question in its original form, in that the company is completely unidenti-
1004 fied. We have mentioned a number of companies here.

Trial Examiner Norwood: That can be straightened out. The objection is overruled.

Answer the question, as read.

The Witness: I would say that Mr. Case represented Anaconda White Lead during Code days, and for a few years thereafter.

By Mr. MacIntyre:

Q. To what period of years do you refer to, when you say "Code days"?

A. I would say at the time of the National Recovery Act, when the NRA was passed, until its termination by the Schechter decision of the Supreme Court.

Q. You would include there, would you, a period before the approval of the Lead Industries Code?

A. Well, that would synchronize with that period.

Q. That is included?

A. That's right.

Q. In your reference to the period as "Code days"?

A. Yes, sir.

Q. Now, did the Anaconda Sales Company have a membership in your Association?

A. I would like to refresh my memory, by referring to my records, because at times it has been International Smelting & Refining, and at other times it has been
1005 Anaconda Sales, and just how that came about, and when that change was made, I would hesitate to trust my own memory.

Q. I show you documents, heretofore marked for identification as Commission's Exhibits 498-A, with sub-letters thereto, 499-A, and subsequent sub-letters, and 500-A, to 500-H, inclusive; and I will ask you to state whether or not those are the records which you just stated you would need to refresh your memory and recollection in making an answer to the pending question.

A. Mr. MacIntyre, are the years designated on these exhibits?

Q. I believe so, just as they were marked when you produced them.

A. That is right; this will help, sir.

Apparently, back in 1929, '30, and '31, it was the International Smelting Company, with United Metal Selling Company as agents. That continued through '32, '33, '34, '35 and '36. Then in '37 it became International Smelting & Refining Company, Anaconda Sales Company, Agents. That is '38, and '39, '40, '41, '42, '43, '44. That brings us almost up to date.

Q. During this latter period, then, that you have indicated for the two companies, they both maintained membership and were represented in the Association by officials?

A. Well, the International Smelting Company—may I ask a question as to whether by "representation," 1006 you mean on the Board or on the Division activities, or just how specific do you wish me to answer this?

Mr. Collin: I object to the question as containing two questions. He asked did each company maintain a membership, and then was there representation. I suggest that the question should be broken up.

Mr. MacIntyre: I would be glad to amend the question and ask him to answer the membership part of it first.

The Witness: Well, so far as International Smelting is concerned, they have mining, smelting, refining, and fabricating activities, and the representation on the Board was through Mr. Clarence Glass.

Mr. Collin: I move to strike it as not being responsive to the question, which deals with membership in the Association.

Mr. MacIntyre: I think we can get along faster by taking information of that kind. I accept it.

Trial Examiner Norwood: I will sustain the objection to the previous question and strike this out, because the record is in a confused state about it.

Just go ahead and ask your questions singly, and let him answer them as to representation, if you want to ask him that, and as to membership, and just point by point.

By Mr. MacIntyre:

Q. Well, Mr. Wormser, for the period you have 1007 indicated, in which you referred to both Anaconda

Sales and the International, those two members maintained membership in your Association, is that correct?

A. Well, the question in my mind is as to whether you consider it two companies or one company, because on our membership list it is listed as International Smelting Company, Anaconda Sales Company, Agents.

1008 Q. But they both were listed on your membership list?

A. In the way I have described it, sir.

Q. Well, I believe you have already stated that Mr. Glass served your Association in an official capacity as a representative of the Anaconda Sales Company.

A. Of the Anaconda Sales as agents for the International Smelting Company, as the director of the Association.

Q. And in that connection, he attended meetings, did he, with other officials and directors of the Association?

A. Correct, sir.

Q. And some of those with whom he attended meetings were officials of The National Lead?

A. Yes, sir.

Q. Eagle-Picher?

A. Yes, sir.

Q. American Smelting & Refining?

A. Yes.

Q. The Glidden Company?

A. Yes, sir.

Q. The Sherwin-Williams Company?

Mr. Welch: Objection. There is not any showing that any officials of the Sherwin-Williams Company were represented at any time on the Board of Directors, and he has stated that the representative of International Smelting attended only the directors' meetings. That is as

1009 far as his testimony has gone.

Trial Examiner Norwood: Well, I think he is making a query there as to whether they were represented or not.

Will the stenographer read the question, please?

(The reporter read the question, as follows:

"Q. And some of those with whom he attended meetings were officials of The National Lead?")

Mr. Hinds: I object, as far as The Glidden Company is concerned, as calling for a conclusion, asking the wit-

ness to characterize, without stating facts, I think he should first state the physical fact.

Trial Examiner Norwood: Well, the objection is too late for that question. The objection is overruled.

Now as to this objection here, as to the Sherwin-Williams Company, I will sustain that objection, because the question is somewhat confused there, being a continued series, and I think counsel may state it in a complete question.

Mr. Hinds: Your Honor, please, the reason that my objection was not timely was because these names came so quickly that I did not have an opportunity to object. Will your Honor relieve me, and strike out the answer, as far as The Glidden Company is concerned, on the ground that I stated, namely, that it calls for a conclusion as to facts.

Trial Examiner Norwood: I shall overrule it on that ground.

1010 You may proceed.

By Mr. MacIntyre:

Q. The Sherwin-Williams Company maintained a membership in your Association since you have been with it?

A. Yes, sir.

Q. Who represented that company in its membership?

A. Going back to the conception of the Association, Mr. MacIntyre?

Q. Yes.

A. Again, if my memory serves me correctly, Mr. Schaefer, represented the company in the early days of membership in the Lead Industries Association, and subsequently, Mr. Coolidge.

Q. Over what period of time did Mr. Coolidge represent his company in your Association?

A. Mr. Coolidge represented the company from code days on.

Q. You mean by that, from say the beginning of 1933 on down to date.

Mr. Welch: Objection. Let him ask the witness what he does mean.

Trial Examiner Norwood: I think the form of the question is objectionable, leading.

By Mr. MacIntyre:

Q. Well, will you please state, Mr. Wormser, just precisely what period of time, including months and

1011 years, that you took into account in your last answer.

A. I would say—

Mr. Welch: Objection. I think the records of the Association are the best evidence as to the period of time, and the man's memory about it may or may not be correct.

Trial Examiner Norwood: Objection overruled.

Answer the question.

The Witness: May I have the question again, sir?

(The reporter read the question.)

The Witness: That would be from the time of the National Recovery Act to its termination.

By Mr. MacIntyre:

Q. Will you refer to Commission's Exhibits for Identification 498, 499, and 500, and see if you can clarify or supplement this last answer of yours, as to the period of time that Mr. Coolidge represented Sherwin-Williams in your Association.

A. Mr. MacIntyre, I am afraid this record does not help me, because it merely lists the directors, and Sherwin-Williams had never been on the Board of Directors of the Lead Industries Association.

Q. What about the Pigments Division records there in that group? Will that help you in refreshing your memory and recollection as to Mr. Coolidge?

A. I can't find that in 499, Mr. MacIntyre. It is 500, I guess—even 500 is not specific on that score, Mr. 1012 MacIntyre.

Q. Have you in testifying as to any period of time that Mr. Coolidge represented Sherwin-Williams?

A. Well, according to this record, in 1933, when our White Lead and Oil Committee become active, Sherwin-Williams Company was one of the members of the Committee. But it does not indicate whether Mr. Coolidge was active at the time, and I would like to have my memory refreshed on that score.

Q. Will Commission's Exhibit for Identification 502-A help you in that connection?

A. Yes, sir. That would indicate that about that time Mr. Coolidge became active.

Q. And are we correct in our understanding that he has since represented them from that date on?

A. Yes, sir.

Mr. Welch: May we have a five-minute recess, please?

Trial Examiner Norwood: We will hold a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order. You may proceed.

By Mr. MacIntyre:

Q. Mr. Wormser, will you state whether or not The Glidden Company has maintained membership in your Association since you have been with it?

A. That is correct, sir; they have.

1013 Q. And will you state what officials of that company have represented it in its membership referring, if necessary, to Commission's Exhibits 498 thru 500-8, and sub-letters thereof, if need be, to refresh your memory and recollection?

A. As I recall, Mr. MacIntyre, Mr. P. E. Sprague was the official representative of the Glidden Company.

Q. And through what period of time, if you can recall, did he represent that company in its membership and the activities of your Association?

A. From the inception of the Association until the last year, I believe, a year or two ago. He has since taken on other responsibilities in the company.

Q. Until about 1944?

A. But he is still on our Board.

Q. On your Board of Directors?

A. On our Board of Directors.

Q. Will you state for what period of time the Metals Refining Company of Hammond, Indiana, has maintained a membership in your Association?

Mr. Hinds: Objected to, on the ground that the record already shows there is no such corporation, that being a mere division of The Glidden Company. You do not contend that that is a corporation, do you, Mr. MacIntyre?

Mr. MacIntyre: I am making no contention about that.

Trial Examiner Norwood: The objection is overruled.

1014 Clarify that situation. The witness will answer the question.

The Witness: Well, the Metals Refining Company was one of the original companies comprising the membership of the Lead Industries Association.

By Mr. MacIntyre:

Q. Has it maintained its membership since?

Mr. Hinds: Objected to, as the question implies a continuity of existence of the corporation. It should be

limited, as such, to the period when it continued to exist as a corporation.

Trial Examiner Norwood: The objection is overruled.

The Witness: And according to our records, it has maintained its membership as a part of the Glidden Company.

By Mr. MacIntyre:

Q. And who represented it in its membership during that period of time?

A. Back in '28 and '29, William Willkie. Subsequently, when taken over by the Glidden Company, it was Mr. Sprague.

Q. From the date it was taken over?

A. From the date it was taken over.

Q. And when was that, if you can state?

A. I would say about 1930, Mr. MacIntyre.

Q. Now, I ask you state whether these officials of these companies, to which you have made reference, in
1015 representing the membership of their companies in meetings and other activities of your association, to your knowledge, met together in connection with those activities? I refer you to Commission's Exhibit 502-A for the purpose of refreshing your memory and recollection, if you need to make reference to such document.

Mr. Ewing: I will object to the form of the question.

Trial Examiner Norwood: Read the question, please.

(The reporter read the question.)

Trial Examiner Norwood: Counsel will make us much happier if he will reframe that question.

By Mr. MacIntyre:

Q. Mr. Wormser, will you state whether or not the representatives of National, Eagle-Picher, Glidden, and Anaconda, Sherwin-Williams—that is, the representatives of those companies—met in connection with any activities carried on through their membership in your Association?

Mr. Ewing: I will object to that, not only on the question of form, but also on the ground that it is irrelevant and immaterial, and further on the ground that it is incompetent and not the best evidence.

Trial Examiner Norwood: Objection overruled.

The Witness: May I ask Your Honor whether Mr.
1016 MacIntyre refers to the entire period of the existence of Lead Industries Association?

Mr. MacIntyre: On any occasion.
The Witness: On any occasion?
Mr. MacIntyre: Yes.
The Witness: The answer is yes.

By Mr. MacIntyre:

Q. And would you say that the Commission's Exhibit for Identification 502-A is a record of a meeting of such representatives?

Mr. Ewing: I will object to that, Your Honor, as referring to a document that is not in evidence and which has already been identified.

Trial Examiner Norwood: I think the document shows what it is.

Mr. Ewing: It is not in evidence.

Mr. MacIntyre: Will you read the question, please?

(The reporter read the question.)

Trial Examiner Norwood: You are going beyond showing the contents. You are showing the inference that may be drawn from the contents, if it were in evidence.

May we have the question read again? It goes to identification of the document.

(The reporter again read the question.)

Trial Examiner Norwood: I believe I was wrong about that. He can identify that as a record of one of those 1017 meetings, if he can.

Mr. Collin: I wonder if I might see the Exhibit before that question is passed.

Trial Examiner Norwood: Let him identify it first.

Mr. Collin: But there was more to the question than his identification.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: I will admit that the question goes to the authenticity of the document, but I think I am entitled to get his answer to the question.

Trial Examiner Norwood: Answer the question.

The Witness: This is a meeting of the White Lead Oil Committee of September 6th.

Trial Examiner Norwood: Don't read from the document; just say whether or not that is a record of such a meeting, as you have just testified that these people entered into or attended.

The Witness: This is a meeting at which these companies were represented.

Trial Examiner Norwood: It is one of those meetings that we were talking about?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. And can you state, from your knowledge, 1018 whether or not those same officials, in representing their companies, attended other meetings of that same division of your association during that period of time, and subsequent thereto?

A. They did, sir.

Mr. MacIntyre: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The hearing stands in recess until 1:30 p. m.

(Whereupon, at 12:25 p. m., a recess was taken until 1:30 p. m. this day.)

1019 Afternoon Session.

1:00 p. m.

Trial Examiner Norwood: Proceed.

Mr. Collin: I wonder if your Honor would indulge me for about two minutes?

Trial Examiner Norwood: All right. We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Let the record show that Mr. Gardiner is now present in place of Mr. Collin.

Proceed.

FELIX E. WORMSER resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. MacIntyre.

Q. Mr. Wormser, at the conclusion of the forenoon session, there was a statement made that there was a subpoena duces tecum sent to you by the Commission. Have you received that?

A. It was received this morning, Mr. MacIntyre.

Q. And do you have it with you?

A. I procured it from my office in the noon recess, and I have it here.

Q. Have you produced the document called for in 1020 the subpoena?

A. I have them here, sir.

Mr. MacIntyre: I ask that the documents be marked for identification as Commission's Exhibits.

Trial Examiner Norwood: They will be marked as Commission's Exhibits 799, 800-A through C, 801-A and B, 802-A and B, 803, 804, 805-A, B and C for identification.

(The documents were marked Commission's Exhibits 799; 800-A, 800-B, 800-C, 801-A, 801-B; 802-A, 802-B; 803; 804; 805-A, 805-B and 805-C for identification.)

By Mr. MacIntyre:

Q. Mr. Wormser, I show you documents marked for identification as Commission's Exhibits 799, 800-A through C, 801-A and B, 802-A and B, 803, 804, 805-A, B and C, and I ask you to state whether or not those are the documents that you have produced here this afternoon in response to the subpoena duces tecum?

A. Those are the documents referred to, sir.

Q. Are those records of the Lead Industries Association?

A. Those are the original records of the Lead Industries Association.

Q. Has the Lead Industries Association kept these records in its regular course of business and affairs?

A. These records have been kept by the Lead Industries Association in its regular course of business.

1021 Q. And as records of the transactions which they purport to be?

Mr. Ewing: I object to that. They speak for themselves.

Trial Examiner Norwood: But he can tell how he kept them.

Mr. Ewing: I object to the form of the question.

Trial Examiner Norwood: Objection overruled.

Mr MacIntyre: Read the question to the witness, please.

(The reporter read the question as follows:

"Q. And as records of the transactions which they purport to be?")

By Mr. MacIntyre:

Q. Are we correct in our understanding, Mr. Wormser, that the documents have been kept by the Lead Industries Association in regular course as records of the transactions which they purport to be?

Mr. Ewing: I make the same objection.

Trial Examiner Norwood: You may answer. The objection is overruled.

The Witness: Yes.

By Mr. MacIntyre:

Q. And as having been prepared by the parties whose names appear thereon as purporting to have prepared them?

1022 Mr. Ewing: I will object to that.

Trial Examiner Norwood: Will you state your objection?

Mr. Ewing: The documents appear to be minutes presumably prepared by a secretary who acted as secretary at the particular meeting involved. There are lots of other names on the documents in question.

Trial Examiner Norwood: I think he can ask a few questions to make it clear that these are true records.

Mr. Ewing: There is no dispute about it. We will concede that they are true and correct and original minutes of the meetings as stated thereon.

Trial Examiner Norwood: I will sustain the objection to that question.

By Mr. MacIntyre:

Q. Did you prepare the documents, Mr. Wormser?

A. Yes, sir.

Mr. MacIntyre: If your Honor please, I now offer in evidence the documents in photostatic form with the understanding that as soon as we are able to have these photostated, the photostats will be stamped as received in evidence and these original papers of the Lead Industries Association then returned to Mr. Wormser.

Trial Examiner Norwood: All right. Is there any objection?

1023 Mr. Ewing: If your Honor please, we object to the receipt in evidence of these exhibits that have just been offered on the ground that they are irrelevant and immaterial and relate primarily to a formulation and adoption of the code for the Lead Pigments Division.

Trial Examiner Norwood: Is there any further objection?

Mr. Gardiner: If your Honor please, may we complete our examination of the documents?

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: If your Honor please, on behalf of respondents, Anaconda Copper Mining Company and International Smelting and Refining Company, I object to the introduction of Exhibits 799, 800-A through 802-B inclusive in that there is no showing in any of these documents that they apply to either of those two respondents, neither company's name appearing in any of these exhibits nor any officers of those companies.

As to Exhibits 803 and 804, I object to their introduction in evidence in behalf of those two respondents on the ground that they are immaterial and irrelevant.

Trial Examiner Norwood: What have you to say, Mr. MacIntyre, or Mr. Wright, as to the relevancy of those papers?

Mr. MacIntyre: They show that these respondents 1024 in meeting through their representatives participated in activities that are relevant to the charges in the complaint, which activities were not sanctioned by law.

Mr. Gardiner: If your Honor please, as to Exhibits 799 and 800-A through 802-B, I should like again to point out that there is no reference to the two respondents, the Anaconda Copper Mining Company and the International Smelting and Refining Company, and no mention of any officials of those two respondents.

Trial Examiner Norwood: I think if the material here is of value that they can be used against clients on the basis as showing whether they are members and so forth. It has to be connected in that way.

Mr. Ewing: I would like to point out that the only activity that those documents show is a discussion and a consideration of various questions in connection with the adoption of a code and they do not show any of the activities that are referred to were indulged in other than they were discussed.

Mr. MacIntyre: We cannot put everything in at once.

Trial Examiner Norwood: Well, I see here there are some discussions about prices and terms.

Mr. Ewing: Certainly there was a discussion. But it

might well be relevant if and when the adoption of
1025 the terms is shown. But this is simply another instance of the cart being put in before the horse.

Mr. MacIntyre: Again I would like to say that there has been quite a good deal of evidence put in about the activities and that was put in last week in Washington.

Trial Examiner Norwood: The price discussions here were during the time that they were formulating the code, is that correct?

The Witness: Yes, sir.

Trial Examiner Norwood: I have always received these papers to show background and for the purpose of explanation if anything has been shown in the way of similar activities before or after the code.

For that purpose I shall receive these and overrule the objections. They will be received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 799, 800-A, 800-B, 800-C, 801-A, 801-B; 802-A, 802-B; 803, 804, 805-A, 805-B, and 805-C, were received in evidence.)

Mr. Gardiner: If your Honor please, I would like to have the record show that the same objection was made on behalf of the respondents, Anaconda and International, to the introduction of Exhibits 805-A and 805-B as were made to Exhibits 803 and 804.

Trial Examiner Norwood: You have your excep-
1026 tion, the ruling is the same.

By Mr. MacIntyre:

Q. Mr. Wormser, I refer you to a document marked heretofore as Commission's Exhibit 507-M, one of the documents that you produced from your own files before, and I ask you to state what that is.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The Witness: Your Honor, this is a letter dated December 13, 1934, or a copy of a letter, written by me to Mr. Sprague of the Euston Lead Company wherein I ask him whether he desires to—

Mr. Ewing: (Interposing.) I object to any statement with respect to any contents of the document.

Trial Examiner Norwood: Do not state anything that is contained in the letter.

The Witness: I thought he wanted me to describe what it was.

By Mr. MacIntyre:

Q. Now, I refer to Commission's Exhibit 507-L and I ask you to state what that is?

A. It is a telegram sent to me by the Metals Refining Company, dated September 15, 1934.

Q. Will you tell us, whether or not, Mr. Wormser,
1027 that the letter that is referred to in that telegram in the word "relet" is Commission's Exhibit for identification 507-M?

A. I believe it is.

Q. I now show you a document marked for identification as Commission's Exhibit 508-A, and I ask you to state what that is?

A. It is a letter from me dated July 27—a copy of a letter from me dated July 27, 1933 to Mr. F. O. Case.

Q. And I now refer to Commission's Exhibit for identification 508-D, and I ask you to state what that is?

A. It is a copy of a letter from me to Mr. Case dated July 21, 1933 with copies to Mr. Bendelari, Roosevelt, Zappert, Evans, W. Parmer Fuller, Jr., William Wilke, Jr., P. E. Sprague, H. J. Hain and A. P. Wetherill.

Q. I now show you a document marked for identification as Commission's Exhibit 508-B and I ask you to state what that is?

A. It is a letter from Mr. Case dated July 24, 1933 to me.

Q. Will you state whether or not Commission's Exhibit 508-D is the letter referred to in Exhibit 508-B, the first line?

A. May I read them? I haven't seen them in 13 years.

Q. If you need to refresh your recollection, go right ahead.

A. It is.

Q. I now refer to Commission's Exhibit 508-C and
1028 I ask you to state what that is?

A. This is a bulletin or notice to the members of the Lead Pigments Division, dated July 25, 1933.

Q. From whom?

A. From me.

Q. And would you say that that was an attachment to any other correspondence either to you or from you?

A. I don't know what you mean, Mr. MacIntyre, by attachment.

Q. Is it enclosed with any other correspondence that is now connected with it in any way.

A. It probably had some relation to it.

Mr. Ewing: I move to strike the answer. The question asked was whether it enclosed any other correspondence, and that is quite different.

Trial Examiner Norwood: I think that is more or less speculative, isn't it? Read the question and the answer.

(The reporter read the question and answer as follows:

"Q. Is it enclosed with any other correspondence that is now connected with it in any way?

"A. It probably had some relation to it.")

Trial Examiner Norwood: I am going to allow the motion to strike that answer and you can bring out
1029 what you want to, but it is rather confusing.

Mr. Ewing: That is why I made the motion.

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. I ask you, Mr. Wormser, whether Commission's Exhibit for identification 508-C was enclosed with or had any relationship to any other document to which you make reference?

Mr. Ewing: I will object to that on the ground that there are two questions in one and that it is indefinite in its scope.

Trial Examiner Norwood: Let him answer of his own knowledge.

The Witness: Your Honor, it is rather difficult for me to give a precise answer to that question without reading the letter carefully. I notice, for example, that this document that I sent out on July 25 being attached to another letter here, July 24, apparently mailed from Chicago— I don't know whether I could have received it in time to send this other announcement, and I would like to study it to see whether it is connected with it.

Trial Examiner Norwood: If that document was enclosed with or had any relation to—

By Mr. MacIntyre:

Q. (Interposing.) —any documents to which you can now make reference?

1030 A. Well, both documents refer to pigments. This notice of mine of July 25 relates to lead pigments and this letter of Mr. Case's has some bearing on pigments.

But what the connection between the two is, I would have to study and reflect a bit before I can give an intelligent answer.

Trial Examiner Norwood: Well, you can answer the question as to the enclosure and that vague query to which you can make reference—that is not clear to me as to what that means. I will sustain the objection to the question as it now stands.

The Witness: As a matter of fact, your Honor, I see no reference to an enclosure in my notice here, so I don't think, Mr. MacIntyre, that it really was enclosed.

By Mr. MacIntyre:

Q. Now, I refer you to Commission's Exhibit 510-E for identification, and I ask you to state what that is?

A. This is a letter from Mr. Maston.

Q. Of the Eagle Picher Lead Company.

A. Dated August 21, 1933 to me.

Q. I now call your attention to Commission's Exhibit for identification 510-C and D and ask you to state what that is?

A. This is a letter dated August 23, 1933 to Mr. Maston. It is a copy of a letter from me to Mr. Maston dated August 23, 1933.

1031 Q. Now referring to Commission's Exhibit 510-B, I ask you to state what that is?

A. It is a copy of a telegram dated August 24 from me to Mr. Maston.

Q. And now refer to the document for identification, Commission's Exhibit 510-A, and I ask you to state what that is?

A. It is a telegram from me to Mr. Maston dated August 25, 1933.

Q. I now call your attention to Commission's Exhibit 511-A through D, and I ask you to state what that is?

A. It is a letter from Mr. Maston of the Eagle-Picher Lead Company dated August 5, 1933 to me.

Q. That is Exhibit 511-A, that you are referring to, is that correct?

A. That's correct.

Q. And the other sheets are what?

A. Exhibit 511-B is a copy of a memorandum from Mr. Maston to Mr. Roosevelt of the Eagle Picher Lead Company. And Exhibit 511-C is apparently a memorandum

of Mr. Maston which is an attachment to his memorandum of August 5, 1933 to Mr. Roosevelt.

Q. Can you tell us whether or not that Exhibit 511-B, C and D were enclosed by Mr. Maston with his letter to you under date of August 5, 1933 as is represented by Commission's Exhibit for identification 511-A?

1032 A. May I read the letter?

Q. Yes.

A. Yes.

Q. I show you documents marked for identification as Commission's Exhibit 514-A through H, and I ask you to state what each of these documents is. And when you make a statement, please refer to them by the sub-numbers. That is, whether it is one document of one page or more.

A. Exhibit 514-A and 514-B is a two-page letter addressed to me by Mr. Case of Anaconda Lead Products Company and is dated September 27, 1933.

Exhibit 514-C is a copy of a letter to Mr. Case from me dated September 22, 1933. That is not my typewriting and it is not my typewriter, and I am not sure about that letter.

Mr. Ewing: Do you have reference to Exhibit 514-C?

The Witness: Yes.

Mr. Wright: May I have the answer read?

Trial Examiner Norwood: Read the answer.

(The reporter read the answer as follows:

"A. Exhibit 514-A and 514-B is a two-page letter addressed to me by Mr. Case of Anaconda Lead Products Company and is dated September 27, 1933. Exhibit 514-C is a copy of a letter to Mr. Case from me dated September 22, 1933. That is not my typewriting

1033 and it is not my typewriter, and I am not sure about that letter.")

The Witness: I am not sure about that letter, sir. Exhibit 514-D is a letter from Mr. Carter, president of the National Lead Company to me, dated September 21, 1933.

Exhibit 514-E is a copy of a letter from me to Mr. Case dated September 19, 1933.

Exhibit 514-F is the second page of that letter.

Exhibit 514-G and H is an original letter from Mr. Case to me dated September 15, 1933.

By Mr. MacIntyre:

Q. I now show you documents marked for identification as Commission's Exhibits 517-A, B and C, and I ask you to state what they are?

A. Exhibit 517-A is a copy of a letter from Mr. F. M. Carter to Mr. W. P. Fuller, Jr., president of the W. P. Fuller & Company, San Francisco, dated November 10, 1933.

Exhibit 517-B and C is an original letter from Mr. Case to me dated October 7, 1933 and Exhibit 517-D is an original letter from Mr. P. E. Sprague to me dated October 7, 1933.

Q. I now show you a document marked for identification as Commission's Exhibit 515-D and E, and I ask you to state what that is?

A. Exhibit 515-D and E is a letter from Mr. P. E.
1034 Sprague to me dated September 29, 1933.

Q. That is, Mr. Sprague who represented the Glidden and the Metals Company in your association?

A. The Metals Refining Company?

Q. Yes.

A. Yes, sir.

Q. And also the Glidden Company?

A. Yes, sir.

Q. I now show you a document marked for identification as Commission's Exhibit 516-B and C, and I ask you to state what that is?

A. Exhibit 516-B and C is an original letter from Mr. T. H. Zappert of the Euston Lead Comany to the Lead Industries Association to my attention, dated, September 29, 1933.

Q. Mr. Zappert represented the Euston Lead Company and the Glidden Company in its relation with the association at times, did he?

A. He represented the Euston Lead Company at times.

Q. Can you tell us what Commission's Exhibit 516-A is?

A. Exhibit 516-A is a copy of a letter from me to Mr. Zappert dated October 4, 1933.

Q. Is that in reply to Exhibits B and C?

A. May I read it?

Q. Yes.

A. It is.

1035 Q. I now show you Commission's Exhibit 518-A and B, and I ask you to state what that is?

A. It is a copy of a letter from Mr. F. M. Carter to Messrs. W. E. Maston of the Eagle Picher Lead Company, and Mr. Harold Rowe of the National Lead Company, dated January 18, 1934.

Q. Is this reference to you in the upper righthand corner of Exhibit 518-A in Mr. Carter's handwriting?

A. It looks very much like it, sir. I am not a handwriting expert.

Q. And he sent this copy to you?

A. Yes, sir.

Q. I now show you a document marked for identification as Commission's Exhibit 519-B, and I ask you to state what that is?

A. It is an original letter from Mr. W. E. Maston of the Eagle Picher Lead Company to me dated January 13, 1934.

Mr. Welch: What date?

Mr. MacIntyre: January 31, 1934.

By Mr. MacIntyre:

Q. And now refer to Commission's Exhibit for identification 519-A, and I ask you to state what that is?

A. It is a copy of a letter from me dated February 2, 1934 to Mr. W. E. Maston.

Q. Is that a reply to Mr. Maston's letter which is 1036 Exhibit 519-B?

A. It is.

Q. Can you tell us whether Mr. Maston enclosed a map with his letter to you?

A. He did.

Q. What became of that map, Mr. Wormser?

A. It was filed and remained buried in the files until Mr. Dunn walked into my office and asked me for a zone map, and I had completely forgotten about it and I incorrectly informed Mr. Dunn that we had no map. I had completely forgotten about it.

Then we brought up the record of the code days and Mr. Dunn found it there.

Q. So you gave the map to Mr. Dunn?

A. That's right, sir.

Q. The zone map that you gave Mr. Dunn is the zone map that Mr. Maston enclosed with his letter to you under date of January 31, 1934, which is now marked for identification as Commission's Exhibit 519-B?

A. Yes, sir.

Q. I now show you Commission's Exhibit 520-B for identification, and I ask you to state what that is?

A. It is an original letter from Mr. Zappert of the

Euston Lead Company and marked to my attention dated July 31, 1933.

1037 Q. Can you tell us what Exhibit 520-A is?

A. It is a letter from my secretary to Mr. Zappert dated August 1, 1933.

Q. Is that an acknowledgment of and a reply to Exhibit 520-B?

A. Yes, sir.

Q. I now show you a document marked for identification as Commission's Exhibit 521-A and B, and I ask you to state what that is?

A. Two pages of an original letter from Mr. P. E. Sprague of the Metals Refining Company to me dated September 14, 1933.

Q. I now show you document marked for identification as Commission's Exhibit 522-A through H, and I ask you to state what they are, and refer in each instance to the letters as well as the identifying numbers.

A. Exhibit 522-A is a copy of a telegram from me to Mr. F. M. Carter, Chicago, Illinois, dated October 30, 1933.

Exhibit 522-B is a copy of a letter from me to Mr. Carter, dated October 30, 1933.

Exhibit 522-C is an original letter from me dated October 30, 1933 to Mr. Carter.

Mr. Ewing: What date?

The Witness: October 30, 1933.

1038 Exhibit 522-D and 522-E is a suggested outline of a uniform basis for the sale of lead oxides in carlots.

Exhibit 522-F and 522-G is a suggested outline of a uniform basis for the sale of lead oxide in less carload lots.

Exhibit 522-H is a carbon copy of a suggested outline of a uniform basis for the sale of lead oxides in less carload lots dated October 4, 1933.

By Mr. MacIntyre:

Q. Is Commission's Exhibit 522-i the second sheet of the document marked for identification as Commission's Exhibit 522-H?

A. Exhibit 522-i is apparently the second sheet of Exhibit 522-H.

Q. Now I show you Commission's Exhibit for identification 523-A and I ask you to state what that is?

A. Exhibit 523 is a copy of a letter from Mr. Carter to Mr. Sprague dated November 9, 1933.

Mr. Welch: What date?

The Witness: November 9, 1933.

By Mr. MacIntyre:

Q. Now, I show you a document marked for identification as Commission's Exhibit 524-A through F, and I ask you to state what that is?

A. Exhibit 524-A to E is a mimeographed copy of a draft of the supplementary code of fair competition
1039 for the Lead Pigments Division of the Lead Industries Association dated November 11, 1933 and identified in the upper right-hand corner as the Lead Pigments Code, Fourth Draft.

Exhibit 524 is merely a letterhead entitled "Specification No. 1 of Docket 5253."

Q. Mr. Wormser, does your office of the Lead Industries Association issue any regular publication to the paint and oil trade, setting forth purported current market quotations on lead pigments?

A. No, sir.

Q. Is there such a publication issued to the trade?

Mr. Ewing: I object to that. It might be issued by anybody.

Trial Examiner Norwood: Well, I think he might tell us that. The objection is overruled.

The Witness: The only thing I know of in that connection, Mr. MacIntyre, are the trade papers serving the paint industry.

By Mr. MacIntyre:

Q. What trade papers do you have reference to?

A. For example, the American Paint Journal, Oil, Paint and Drug Reporter, Oil, Paint and Chemical Review.

Q. Does the Oil Paint and Drug Reporter purport to carry any current market quotations on lead pigments?

A. Yes, sir. It has a market section giving the quotations.

1040 Q. Is it published regularly?

A. It is published every week, I believe.

Q. Does your office furnish any information on lead pigments to that publication?

A. None whatsoever.

Q. Do they solicit for you any information on quotations?

A. We have never been solicited since the history of

the Lead Industries Association for any such information from the Oil, Paint and Drug Reporter, or any other trade journal in the United States.

Q. Your answer to those questions is based upon what you knew as to what has been done?

A. Yes.

Q. Do you speak for all representatives and members of your Association or attempt to do so when you answer such questions?

Mr. Hinds: I object, Your Honor. This witness has no authority to speak for anybody here, and I hereby repudiate any representation by this witness on behalf of my client.

Trial Examiner Norwood: The objection is overruled.

Mr. Hinds: Will you read the question, please?

(Whereupon, the reporter read the question as follows: "Do you speak for all representatives and members of your Association or attempt to do so when you answer such questions?")

Mr. Hinds: How could he speak for any of these 1041 respondents?

Trial Examiner Norwood: Well, he could tell us whether he does or not. The objection is overruled. Let him answer.

The Witness: I am speaking for myself.

By Mr. MacIntyre:

Q. You don't purport to state that you have any knowledge then as to what these others have done in furnishing information to the publication?

Mr. Ewing: I object to that.

Trial Examiner Norwood: The objection is sustained.

By Mr. MacIntyre:

Q. Do you have any knowledge, Mr. Wormser, as to what these representatives of your Association members have done toward furnishing information to that publication?

Mr. Ewing: I object to that. I don't know what these representatives means.

Trial Examiner Norwood: I will let him answer that. Objection overruled.

Mr. Ewing: I think Mr. MacIntyre should specify the people to whom reference is made.

Trial Examiner Norwood: Read the question.

(Whereupon the reporter read the question, as follows:

"'Q. Do you have any knowledge, Mr. Wormser, as to what these representatives of your Association mem-
1042 bers have done toward furnishing information to that publication?'")

Trial Examiner Norwood: I think that is perfectly clear.

Mr. Ewing: Might I amplify it to this extent—Mr. Wormser has his own employees up there, and that is the organization of lead industries. Now respondents here, or some of them, are members of the Lead Industries Association, and it seems to me that there are two entirely different groups that are involved in the question as raised.

Trial Examiner Norwood: He is asking whether these representatives have furnished this publication with any price information. I think he may answer that. The objection is overruled. Answer the question.

The Witness: I do not know what their practice is in that regard.

Trial Examiner Norwood: You don't know what they have done?

The Witness: I do not know what they have done.

Trial Examiner Norwood: We will take a 5-minute recess at this time.

(Thereupon a short recess was taken.)

By Mr. MacIntyre:

Q. Mr. Wormser, I show you documents marked
1043 for identification as Commission's Exhibit 519-A and 519-B, and I ask you to state whether you recall the fact that Mr. Dunn, of the Federal Trade Commission, returned that zone map that is referred to in those documents to you after he borrowed it from you?

A. Frankly, I don't know where it is, sir. I don't recall whether he returned it or not.

Q. You have no recollection of his return of that map to you?

A. No, sir. I may have it, but that was about two years ago, and I haven't the faintest idea where it is now, sir.

Q. Will you check your records and files to see if you can determine whether that map is in your files as returned by Mr. Dunn to you?

A. I will be very glad to, sir.

Q. And turn it over to Mr. Ewing with authority for him to state whether what you do turn over to him is a

zone map such as was enclosed by Mr. Maston to you with this document, Exhibit 519-B? Will you do that?

A. I will be very glad to, sir.

Q. All right.

Mr. MacIntyre: And if he does that, you will so state on the record for us, will you, Mr. Ewing?

Mr. Ewing: I will state whatever he tells me, sir.

1044 Mr. MacIntyre: If Your Honor please, I believe that concludes our examination of Mr. Wormser, and we tender him for cross examination.

Mr. Ewing: No cross examination on behalf of respondents.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. MacIntyre: If Your Honor please, I will now offer into the record a number of documents, which have heretofore been marked for identification.

I now offer Commission's Exhibits for Identification 666, 667, 668, 669, and 670. These exhibits have heretofore been identified as statements of statistics of the Lead Pigments Division of the Lead Industries Association, and as being what they purport to be on their faces thereof. We offer them as such.

Mr. DuBose: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Ewing: With respect to the current proffer of Exhibits 666 through 670, inclusive, for identification, produced by Mr. Dunn, and identified by him heretofore in the record, the papers being obtained by him from Lead

1045 Industries Association, I submit that they are not binding on any of the respondents as such, coming from the files of an outside party. And with respect to Exhibit 669 for identification, I would object to the reception in evidence of the notations in pencil writing on it, which, according to Mr. Dunn's testimony, were placed there by him.

Other than that there is no objection.

Trial Examiner Norwood: They came from the files of the Association, did they?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Is there any further objection?

Mr. Welch: It is our understanding that an objection on behalf of one respondent runs to all.

Trial Examiner Norwood: Yes; you have the benefit of the objection and any exception.

The exhibits will be received as marked.

(The papers referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 666, 667, 668, 669, 670, were received in evidence.)

Trial Examiner Norwood: Let us have an understanding here on the record about this pencil writing.

Have you offered that?

I don't know if that is necessary, but because they might identify it later.

1046 Mr. Welch: He has already identified it, Your Honor.

Trial Examiner Norwood: Whose writing is it?

Mr. Welch: Mr. Dunn has already testified he put it on there after he got the papers.

Mr. MacIntyre: But, if Your Honor please, we can not have this taken off there now, because I attempted to question Mr. Dunn about the notes. I questioned Mr. Dunn, when he was on the stand in Cleveland; and counsel for respondents objected, and their objections were sustained, because they stated that I was restricted at that time under the Commission's to do nothing other than identify the documents.

Mr. Ewing: You questioned him about those notes without any objection at all.

Mr. MacIntyre: In any event, I do not want them taken off as yet. I can say that I am not offering the pencil notes as a part of the document. We are talking now about Document No. 667.

Trial Examiner Norwood: The document will be received in evidence, all of it, except the pencil notes which we have been discussing.

Mr. Wright: Your Honor, with reference to the pencil notes, the record on page 346 is clear as to those, that they were pencil notes in explanation of the figures them-

1047 selves in the light of explanations which were made by the man who prepared them.

Mr. Ewing: He made his explanation, to the extent that you pressed it there without any objection.

Trial Examiner Norwood: I think that will do about the notes.

You may proceed.

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commissioner's Exhibits 498-A through 498-K.

I offer these as listing names of members of the Lead Industries Association during the periods of time from 1929 to 1944, as identified and testified to in page 99 of the record.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: They will be received as marked.

(The documents heretofore marked for identification as COMMISSION'S EXHIBITS 498-A, 498-B, 498-C, 498-D, 498-E, 498-F, 498-G, 498-H, 498-I, 498-J, and 498-K, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 499-A through H.

1048 I offer them as records containing the names of the directors of the Lead Industries Association, the names of the members of the Executive Committee of the Lead Industries Association, and as records of names of officers of the Lead Industries Association, for various years during the period from 1928 to 1944; and as identified and testified about on page 100 of the record.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 499-A, 499-B, 499-C, 499-D, 499-E, 499-F, 499-G, and 499-H, were received in evidence.)

Mr. MacIntyre: I now offer into the record documents heretofore marked for identification as Commission's Exhibit 500-A through H, inclusive.

I offer these as records showing the names and addresses of the officers, directors, and trustees of the Lead Industries Association, and the names of members of committees of that Association in each of a number of the divisions of the Association, as made and revised annually since the first such records were made and kept in the offices of the Association, and as identified on pages 100 and 101 of the record.

Mr. Ewing: We have no objection to the receipt
1049 into evidence of the documents proffered, but would like to reserve a qualification with respect to charac-

terization, if that be the correct term, that they were revised annually. I am not sure that that is the fact in the case of this exhibit.

Trial Examiner Norwood: It will be received as marked.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 500-A, 500-B, 500-C, 500-D, 500-E, 500-F, 500-G, and 500-H, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification as Commission's Exhibit 501-A through D, inclusive, as identified on page 101 of the record, as being records of minutes of a meeting of the members of the Pigments Division of the White Lead-In-Oil Committee of the Lead Industries Association, organized in 1933.

Mr. Ewing: We object to this upon the same ground that objection was made to the receipt in evidence of the other minutes offered here this afternoon.

Trial Examiner Norwood: Objection overruled. They will be received as marked.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 501-A, 1050 501-B, 501-C, and 501-D, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into evidence documents heretofore marked for identification as COMMISSION'S EXHIBITS 502-A through C, inclusive, as identified on the record on page 104, and subsequently, as being records of meetings of representatives of members of the Pigments Division of the Lead Industries Association, September 6, 1933.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received. Same ruling.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 502-A, 502-B, and 502-C, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 504-A and 504-B, as identified on the record at page 111 and 112. It goes over into 114—from 111 to 114 of the record. They are minutes of a meeting of representatives of these respondents on October 27, 1953.

Mr. Ewing: The same objection.

Trial Examiner Norwood: They will be received as marked.

Objection overruled.

(The papers referred to, heretofore marked for 1051 identification as COMMISSION'S EXHIBITS 504-A, and 504-B, were received in evidence.)

Mr. MacIntyre: I now offer into the record documents heretofore marked for identification as Commission's Exhibits 505-A and B, as identified on the record, page 116, as being minutes of a meeting of representatives of these respondents on October 28, 1933.

Mr. Ewing: The same objection.

Trial Examiner Norwood: The same ruling. They will be received as marked.

(The papers referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 505-A and 505-B were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 506-A through F, inclusive, as identified on the record, beginning at page 118.

1052 Mr. Ewing: Same objection.

Trial Examiner Norwood: It will be received.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 506-A, 506-B, 506-C, 506-D, 506-E, 506-F, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification Commission's Exhibits 507-A thru M, as identified on the record beginning on page 120 and as further identified by Mr. Wormser today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 507-A, 507-B, 507-C, 507-D, 507-E, 507-F, 507-G, 507-H, 507-I, 507-J, 507-K, 507-L, 507-M, were received in evidence.)

Mr. MacIntyre: I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 508-A thru D; 510-A through E; 511-A thru D, as produced and identified by Mr. Wormser on the occasion of his appearance as a witness in this case on January 16, 1945, and again today.

Mr. Ewing: Just to make sure that my recollection is

correct, I believe that when I made objections to the first minutes proper, it was on the ground that they were
1053 irrelevant and immaterial, as concerning transactions during the code period. That is the objection that I have been repeating.

Trial Examiner Norwood: Counsel may have his exception on that basis.

You stated your objection to 508, 510 and 511.

Mr. Ewing: Yes.

Trial Examiner Norwood: Received, as marked. The objection is overruled.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 508-A, 508-B, 508-C, 508-D; 510-A, 510-B, 510-C, 510-D, 510-E; 511-A, 511-B, 511-C, 511-D, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I will now offer into the record the documents heretofore marked for identification as Commission Exhibits Exhibit 513-B, as identified through the concession of Mr. Wood, line 12, on page 131 of the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. MacIntyre: In that connection, I will refer you to the identification appearing on line 12, page 131 of the record.

1054 At this time I also offer documents marked for identification as Commission's Exhibits 513-A through E as attachments to the letter from Mr. Maston to Mr. Wormser, namely, 513-B, and as is shown by the record to be such attachment as lines 1 to 4 of Page 131 of the record, and Mr. Wormser's reply to Mr. Maston's letter, namely, Commission's Exhibit for identification 513-A.

Mr. Du Bose: Has Exhibit 513-A been identified as a reply?

Mr. MacIntyre: Produced by Mr. Wormser, along with the other documents.

Mr. Ewing: The same objection.

Trial Examiner Norwood: What are they—minutes?

Mr. Ewing: No, this is the correspondence referred to before, between Mr. Maston and Mr. Wormser.

Trial Examiner Norwood: It will be received as marked.

Objection overruled.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 513-A, 513-B, 513-C, 513-D, 513-E, were received in evidence.)

Mr. MacIntyre: Was there an objection to that?

Mr. Ewing: Yes, I made the same objection.

Mr. MacIntyre: That is, it was in the code period?

Mr. Ewing: And irrelevant and immaterial.

1055 Mr. MacIntyre: If Your Honor please, I now offer into the record, documents heretofore marked for identification as Commission's Exhibits 514-A thru H, as identified January 16, 1945, by Mr. Wormser when he appeared as a witness and as further identified today.

Mr. Ewing: Where were they identified?

Mr. Welch: Those were introduced today.

Mr. Ewing: They were not ever identified before?

Mr. Wright: They were identified as having been produced in the records of the Lead Industries Association.

Mr. Welch: There is no detailed identification until today.

Mr. MacIntyre: I don't recall.

Mr. Ewing: I make the same objection, with respect to the exhibits just proffered, and in addition, with respect to 514-C, my recollection is that Mr. Wormser today testified, correcting himself, and stated that he didn't think that that was his letter.

Trial Examiner Norwood: He made some objection to the typing.

Mr. Ewing: That's right.

Mr. MacIntyre: He just merely stated that he had no recollection that it was his letter. He did not deny it being a copy of his letter, and he produced it from his files.

1056 Mr. Dixon: He said he didn't remember having a typewriter type like that.

Mr. Ewing: He said it wasn't his letter.

Mr. DuBose: He said he could not be sure; he could not identify it, in other words.

Trial Examiner Norwood: Well, I will receive that along with the others, subject to a motion to strike if we find out, after some study that it is not apparent on the face of it, that it does belong in there.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 514-A, 514-B, 514-C, 514-D, 514-E, 514-F, 514-G, 514-H, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification Commission's Exhibits 515-A thru K, as identified when produced January 16, 1945, by Mr. Wormser, from the files of the Lead Industries Association, and as that identification has been supplemented today.

Mr. Ewing: I make the same objection.

Mr. MacIntyre: And I want to point out that that offer includes 515-H-2—515-A thru K, and including 515-H-2.

Trial Examiner Norwood: Yes, this ruling includes 515-H and then 515-H-2.

1057 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 515-A, 515-B, 515-C, 515-D, 515-E, 515-F, 515-G, 515-H-1, 515-H-2, 515-I, 515-J, 515-K, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents herefofore marked for identification as Commission's Exhibits 517-A thru -D, as identified when produced from the files of the Lead Industries Association on January 16, 1945, by Mr. Wormser, and as that identification was supplemented today.

Mr. Ewing: The same objection, Your Honor.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 517-A, 517-B, 517-C, 517-D, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 516-A thru C, as identified when produced from the files of the Lead Industries Association by Mr. Wormser, on January 16, 1945, and as further identified today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. Objection is overruled.

1058 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 516-A, 516-B, 516-C, were received in evidence.)

Mr. MacIntyre: I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 518-A and B, as identified on January 16, 1945, and as that identification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received. The same ruling.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 518-A and 518-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's 519-A and B, as identified on the record of January 16, 1945, and as it was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 519-A and 519-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 520-A and B, as identified on the record of January 16, 1945, and as iden-
1059 tification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

Objection overruled.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 520-A and 520-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 521-A and B, as identified on January 16, 1945 and supplemented through the testimony today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

The objection is overruled.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 521-A and 521-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I offer into the record documents heretofore marked for identification as Commission's Exhibits 522-A thru I, as identified on the record of January 16, 1945, and as such identification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. The same ruling.

1060 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 522-A, 522-B, 522-C, 522-D, 522-E, 522-F, 522-G, 522-H, 522-i, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I offer into the record documents heretofore marked for identification as Commission's Exhibit No. 523, as identified January 16, 1945, on the record, and as the identification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. The same ruling.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 523, was received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 524-A thru F, as identified January 16, 1945, on the record, and as that identification was supplemented through the testimony of Mr. Wormser today.

Mr. Ewing: I will make the same objection, with respect to 524-A through F; and with respect to 524-F, standing alone, that is the document that was described as being the letterhead of Lead Industries Association, with the typed statement "Specification 1" on it, and I see he has testified that he produced them in response to the subpoena. It does not seem to me it is necessary to clutter the record with 524-F.

1061 Mr. MacIntyre: I will withdraw the offer on 524-F, because I don't think it is necessary.

Trial Examiner Norwood: "A" thru "E", then.

Do you have the same objection?

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 524-A, 524-B, 524-C, 524-D, 524-E, were received in evidence.)

Mr. MacIntyre: May we take a few minutes for recess?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order.

Mr. MacIntyre: If Your Honor please, I move that we adjourn until 9:00 o'clock tomorrow morning, Eastern Standard Time.

Trial Examiner Norwood: We will adjourn until tomorrow morning at 9:00 o'clock Eastern Standard Time, which is 10:00 o'clock, Eastern Daylight Saving Time.

(Whereupon, at 3:40 p. m., June 25, 1946, the hearing in the above entitled matter was adjourned.)

1062 Room 605, Bar Association Bldg.,
New York City, New York,
June 26, 1946.

Met pursuant to adjournment, at 9:00 a. m., E. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), T. J. McDowell, Esq., (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

1063 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

1064 PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment on yesterday the hearing on Docket 5253 is reconvened at 9:30 o'clock a.m., E. S. T., on the 26th day of June, 1946, in the trial room of the Bar Association Building, at 36 West 44th Street, New York, N. Y. Let the record show the following appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. Dubose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York) appearing for the Glidden Company.

1065 You may proceed.

Mr. Wright: Your Honor, there was a subpoena duces tecum on the National Lead Company, the Secretary of the National Lead Company, which was returnable this morning; and I wonder if Mr. Ewing had any statement to make with reference to that.

Mr. Ewing: Might I say, in connection with the subpoena, Your Honor: With respect to specification 1, which calls for the production of certain price cards, we have here and are able to produce all of the cards covering the periods called for.

With respect to Specification 2, which calls for the production of certain contracts, we have been unable to as yet locate any contracts, partly because of the effort inherently required to find them, and the subpoena was only served 2:30 the day before yesterday, and also because of the fact that the manager of the department involved is out of town. Now, as soon as they can be found, if there

are any in existence of the dates called for, they will be produced.

Trial Examiner Norwood: Yes, that ought to be satisfactory.

Mr. Wright: Mr. Ewing, I call your attention to the fact that Specification 1, calls for price cards and price announcements.

Mr. Ewing: They are the same thing. That is all 1066 we have.

Mr. Wright: Can we have those marked now.

(The cards referred to were marked Commission's Exhibit 806-A, 806-B, 806-C, 806-D, 806-E, 806-F, 806-G, 806-H, 806-I, and 806-J, for identification.)

Mr. Ewing: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: Mr. Ewing, are the documents marked Commission's Exhibit 806-A through J for identification, price cards and price announcements of the National Lead Company, which were returned on the subpoena duces tecum this morning?

Mr. Ewing: That's right.

Mr. Wright: A further question: I call your attention to the pencil notations on these exhibits. Do you know anything with reference to those?

Mr. Ewing: I don't think you should be asking me to answer those questions, as though I were a witness. You might as well bring it out from a witness. You know I don't know anything about it.

Trial Examiner Norwood: You may call your witness.

Mr. Wright: I want to call Mr. Fred McCarthy.

1067 FRED McCARTHY was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you give your name and address to the reporter, please?

A. Fred McCarthy, 111 Broadway, New York City.

Q. Mr. McCarthy, what is your position with the National Lead Company?

A. Manager of trade sales, which applies to package products, white lead and other paint materials.

Q. What briefly are your responsibilities in that position?

A. Well, I am associated with the General Office of the National Lead Company, and we work with our branch organizations in the various parts of the United States, in developing merchandising and other sales technique to increase the sales of these products; also, the Dutch Boy brand.

Q. Do I understand you to say it was just the package products?

A. That's right.

Q. How long have you been in that position?

A. Since March of 1943.

Q. What has been your other service with the
1068 National Lead Company prior to that?

A. Prior to March '43, I was manager of the Cincinnati branch of National Lead Company.

Q. For how long was that?

A. Since '39; and prior to '39 I was assistant manager of that branch.

Q. What were your duties briefly, as manager of the branch of the National Lead Company in Cincinnati?

A. The Cincinnati branch is a metal manufacturing branch, with factories in Cincinnati and Atlanta, and it covers ten states in the middle west for the company, selling all products of the company; and the branch management entails supervision of sales, production, personnel, accounting and the usual operations of a rather autonomous branch.

Q. Mr. McCarthy, do you know the sources of supply of pig lead that are used in the manufacture of pigments by the National Lead Company?

A. We buy from St. Joe Lead Company, United States Smelting and Refining Company, American Smelting and Refining Company, Anaconda Sales Company, and probably three or four other sources of supply throughout the United States.

Q. Does the National Lead Company, or its affiliates or subsidiary companies, produce any of the lead which is used in the manufacture of pigments?

A. We have a subsidiary, the St. Louis Smelting
1069 and Refining Company, which operates from mines in the supply state area; but their production is nil,

so far as our own requirements are concerned, and we are dependent upon the market for our supplies.

Q. Does that hold true over a period of years, say back to 1930 to 1935?

A. Yes, we have never been a factor, to my recollection, in the mining business.

Q. You mentioned several suppliers of pig lead, which is used in the manufacture of pigments. Could you list those in the order of importance; that is to say, in the order of the largest purchases that you make.

Mr. DuBose: That is, of percentages, Mr. Wright?

Mr. Wright: Yes, percentages.

The Witness: We keep the figures, Mr. Wright; and while I am not connected with the metal purchasing department, I don't know that I would be a competent witness on a ratio basis, because all I could say would be to approximate them. But I would say from the figures I have seen from time to time, that our largest single source of supply would be St. Joe; and of course, since Pearl Harbor, the metal reserve division of the Federal Government has more or less monopolized the distribution of pig lead. They buy, of course, from the field, and we in turn are allocated in our own pig lead requirements from Washington from them.

1070 Q. From the records that you have seen, and do you have any other knowledge, whether the prices at which pig lead is purchased from St. Joe, are the same at which pig lead is purchased from American Smelting and Refining?

A. The market on pig lead is uniform, yes.

Q. Can you state what lead pigments the National Lead Company produces at the present time?

A. We produce basic carbonate of white lead, which is known in the trade as dry white lead. We produce basic sulphate of lead, which is another type of white lead, and those are the two large articles of commerce in the paint industry. And then, in addition, we produce various grades of dry red lead, which are used in the manufacture of red lead paints, and those, in the phraseology of the trade, are the only pigments we produce—lead pigments, that is.

Q. Does the Company also produce litharge?

A. Yes. Litharge is an oxide, and we are also a producer of litharge.

Q. Does it produce Orange mineral?

A. That is a very minor article of commerce, and we have produced orange mineral, but frankly, I don't know how long ago it was.

Q. Are any other additional pigments that the National Lead Company sells purchased from others, not produced by National Lead?

1071 Mr. Ewing: You mean lead pigments?

Mr. Wright: Yes.

The Witness: There is a product known as lead acetate, which at one time we manufactured, but because of its very minor tonnage, it is my understanding that in recent years we have purchased it of another chemical company, because the tonnage is such a minor factor that it didn't pay us to maintain its production.

Q. Does National produce the so-called "Blue-Lead"?

A. No, blue lead is a by-product of the smelting process, and since we are not miners and smelters, we don't have access to that type of material.

Q. Does National sell, or have they ever sold it to your knowledge?

A. Occasionally, when specifications have favored blue lead, in order to be competitive, we have secured it in the outside market and we sold it just to keep our place in the picture.

Q. From whom do you recall National purchasing it?

A. I would assume it would be secured from Eagle-Picher, the only known manufacturer of the material.

Q. Am I correct in understanding that National maintains factories and plants in various parts of the United States for producing these various pigments?

A. We are in production of white lead products of five points, the New York area at Perth Amboy, New
1072 Jersey; Philadelphia, Chicago, St. Louis, and in the Oakland section of San Francisco.

Q. Can you state the percentage of production that is accounted for at each one of these points?

Mr. Ewing: You mean the percentage of National's production?

Mr. Wright: Yes, the percentage of National's production.

The Witness: I would say 40% at Chicago; 30% in New York; and 10% at each of the other three points, Philadelphia, St. Louis and San Francisco.

Q. At what points does National produce lead sulphate?

A. Only in St. Louis.

Q. Can you state briefly the process by which lead sulphate is produced?

A. Lead sulphate is a pigment that is chemically precipitated from lead oxide. In other words, the litharge of a proper grade and fineness is precipitated in the presence of sulphuric acid, and produced as lead sulphate.

Q. What processes of producing basic carbonate are employed by National?

A. We are using three processes at the present time: The Carter process, in which atomized lead or lead dust is treated in revolving cylinders in the presence of acetic acid and carbon dioxide. And we use a Thompson-
1073 Stewart process of our own development, in which lead oxide is precipitated chemically in the presence of acetic acid. And at one point we use the Old Dutch process, in which lead buckles or is exposed in stacks in piles of tanbark, for a period of 120 days, developing a form of lead carbonate at the end of that time by a rather natural process.

Q. Can you state whether the resulting product is substantially the same thing?

A. All three products comply with Federal Specifications.

Q. Is there any difference in these three products, produced by the three?

A. Yes, their differences are primarily for the raw material customer who, for example, wants certain qualities in his product. A potter ceramic manufacturer will have a different requirement than a paint grinder; and the manufacturers of putty will use a different grade of lead than the manufacturers of dry colors, for example.

Q. With respect to the basic carbonate that is sold to paint manufacturers, is there any difference in quality as between the carbonate produced by any of these three processes?

A. In this respect only: That some of these pigments are the finer particle size, because of their method of manufacture, and therefore they have different characteristics for the paint manufacturer in point of color and paint consistency and tinting strength.

1074 Q. Are the basic carbonate products produced by these three different processes distinguished by the National Lead Company by a brand or trade name?

A. Oh, yes, they are all sold on the Dutch Boy label; but we advertise in the trade papers, having five types of dry white lead, the 111 and the 333 which are made by the Thompson-Stewart process, the HTS and the Carter, which are made by the Carter process, and the Old Dutch, which is made by the Dutch processes.

Q. Are those three products all sold on the same price basis?

A. Oh, yes.

Q. There is no price or discount differentiation?

A. No, you see, Federal specifications, I imagine, are established by the Bureau of Standards, creating the quality classification for all pigments; and since all these products comply with Federal specifications, they are interchangable qualitywise or cost-wise.

Q. Those are minimum specifications, are they not?

A. They are pretty exact; they don't allow much latitude.

Q. I mean you could exceed those specifications, if it were possible?

A. Not and fall within their limits. For example, the carbonate latitude is between approximately 65 and 72%, and a product in excess of 72% wouldn't be satisfactory, or one less than 65% wouldn't qualify.

1075 Q. At what manufacturing point is red lead produced by National?

A. Red lead is made at Philadelphia, Brooklyn, St. Louis, San Francisco, Dallas, Charleston, West Virigina. I think that is all.

Q. At what point is the principal production of National; that is, could you give a rough percentage of that?

A. It would probably be a tie between St. Louis and Brooklyn.

Q. Approximately what percentage, would you think?

A. I am not a qualified witness, inasmuch as I don't have much contact with the red lead part of it.

Q. What has been your observation?

A. Well, guessing, I would say that probably 30% at St. Louis, and probably 30% at Brooklyn, and about 15% at Philadelphia and Charleston and the balance at Dallas.

Q. That guess is based on your observation and experience in connection with your official business?

A. Yes.

Q. At what points does National produce litharge?

A. In Brooklyn, Philadelphia, Atlanta, Charleston, West Virginia; St. Louis, Dallas, Chicago, San Francisco.

Q. Again, do you have any idea where the bulk of that production is accounted for, amongst those producing points?

A. No, I frankly wouldn't even hazard a guess at that.

Q. Can you make any brief statement about the 1076 processes of red lead and litharge?

A. Well, metallic lead is calcined or roasted and produces first litharge. I am not a chemist, but the chemical symbol for metallic lead is PB; and the chemical symbol for oxygen is O. So that while metallic lead is PB, litharge is PBO; and since the metallic lead in the roasting process picks up oxygen and becomes litharge, and then litharge is subjected to additional calcining or roasting and absorbs additional oxygen, and becomes red lead, which is PBO^4 or 4 parts of oxygen and 3 parts of lead.

Q. Mr. McCarthy, can you state the tonnages of white lead—or dry basic carbonate, and basic sulphate, dry red lead, red lead in oil, and dry litharge, that were produced by National in say 1943, in round numbers?

A. Your Honor, competition is present, and we are rather jealous of such confidential information, in spite of the nature of the accusation. What are your instructions on this question.

Trial Examiner Norwood: Mr. Wright, what are your contentions?

Mr. Wright: Well, it seems to me, your Honor that it is clear that the very nature of the complaint makes this information relevant.

Trial Examiner Norwood: What date was that 1077 you specified?

Mr. Wright: I asked for the year 1943.

Mr. MacIntyre: If your Honor please, National apparently has no compunctions about furnishing figures to the Lead Industries Association for some of the years, with respect to white lead-in-oil sales as shown by the Commission's Exhibit 666. Its competitors didn't give it any concern in so doing there, and we don't think it should here.

1078 The Witness: If your Honor please, we also report to the Bureau of Mines by compulsion, as do all the other people.

Mr. Wright: Your Honor, is the witness counsel in this proceeding?

Trial Examiner Norwood: Well, he has a right to give his reason for not wanting to give this information, which he thinks his company would not want him to give, probably.

Mr. Wright: Well, your Honor, we charge in the complaint that National is the dominant monopolistic influence in this field, and it seems to me that that information is certainly relevant; and if this witness can testify to it, why, it is competent.

Trial Examiner Norwood: We cannot find, though, that that is true in this stage of the inquiry.

Mr. Ewing: In view of the witness's statement, with respect to his exact knowledge on the subject, and the fact that the figures are reported and published by the Bureau of Mines, it would seem to me that they could use the Bureau of Mines figures for any year they wanted to.

Mr. Wright: Your Honor, the Bureau of Mines figures are not available to us. They purport to show general statistics of the industry as a whole. We are asking him about figures of The National Lead Company.

1079 Trial Examiner Norwood: I think we have had stipulations heretofore, as between respondents, and so on, that the Bureau of Mines—will they do that by agreement of the people, that is, furnish the information?

Mr. MacIntyre: I think that if National, through Mr. Ewing, on the record cares to inform the Bureau of Mines to turn that information over to us, I think we will have no difficulty.

Trial Examiner Norwood: Well, it seems to me that this information is rather necessary. I shall instruct the witness to answer the question.

Do you want the question read?

The Witness: I recall the question.

Mr. Ewing: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Proceed.

Mr. Ewing: If your Honor please, I think counsel for the Commission will agree that we have tried to put at their disposal throughout this case all information we were asked to provide them. In this particular case the data sought to be elicited fr[illegible]his witness is of a nature that has never been disclosed [illegible], this company to anybody, ex-

cept as it may be disclosed to an organization such as
1080 the Bureau of Mines, or to the Lead Industries Association; and with respect to Lead Industries Association, that information supplied it by individual companies, is never given out to the other companies, except in a total form. In other words, National's production in particular lines supplied to Lead Industries Association is never passed out to any other member as National's production in that line.

In view of the fact that it is made a practice not to disclose that information, and in view of the fact that it regards it as an important element of its business which should be kept confidential, I feel constrained to instruct the witness not to answer the question.

Mr. Wright: Well, your Honor, I would like to point out that there is already in the record Commission's Exhibit 664, which consists of a memorandum of the sales of white lead and white-lead-in-oil by The National Lead Company, the total sales, which has already been received in evidence in the case.

Mr. MacIntyre: That is one of the pigments involved here. The other pigments, of course, are, I would say, no more important to the position of National in its desire to withhold its disclosure than would be white lead; and the charges in the complaint are to the effect that the large percentages of the total business in each of these disclosed its monopolistic position that it holds. How else can
1081 you prove that fact, in answer to the allegations of the complaint, except by getting answers to the questions of the line such as represented by the pending one.

Trial Examiner Norwood: It will not be necessary to put anything further on the record, because the rest of the talk had to be to the District Judge. The counsel has advised, or rather instructed and advised this witness to refuse, and I take it that the witness does refuse on the advice of counsel.

The Witness: Yes, sir.

Trial Examiner Norwood: Now the Commission's counsel know they are limited. They may go to the District Court for an order to make him answer, if they show it is relevant—if they show its relevancy, materiality, and necessity for it. In that case the Court will instruct the witness to answer it.

By Mr. Wright:

Q. Mr. McCarthy, has The National Lead Company received from the Lead Industries Association statistics which show the proportion of the production or sales of lead pigments of The National Lead Company to the total production of such pigments for the industry?

A. We received from the Lead Industries Association total industry figures, and knowing what our own figures are, we can determine in our own organization by ratio
1082 what our competitive position is; but we don't know what share of the balance belongs to any individual competitor.

Q. My question was: Has The National Lead Company ever received such information compiled to show the percentage of The National Lead Company to the total from the industry?

A. Regularly on each month, we can tell what our share of the total is.

Mr. Ewing: I move to strike that as not responsive.

Trial Examiner Norwood: Read the question and answer, please.

Mr. Wright: Your Honor, I accept that answer.

(The question and answer were read.)

Trial Examiner Norwood: Your motion to strike the answer is denied.

By Mr. Wright:

Q. In what form are the statistics showing the production of the industry received by National Lead Company from Lead Industries Association?

A. A page headed by the type of product, showing the total industry's production, deliveries and inventories, as of the end of the month.

Q. Does that page, as it is received from Lead Industries Association by National Lead Company, have entered upon it the percentage of National Lead Company's production and sales, inventories, and shipments to the total?

1083 Mr. DuBose: (Interposing.) I object to that question, as involving two concepts. He said Does it have entered on it. At what stage do you mean, Mr. Wright? Do you mean the way it was originally?

Mr. Wright: When it was received by The National Lead Company. That was the question.

The Witness: No.

By Mr. Wright:

Q. Do you report to the Lead Industries Association your total production, sales, shipments, and inventories of these pigments?

A. Yes.

Q. At what intervals?

A. Each month.

Q. And is that information also reported to the Bureau of Mines?

A. I think the Bureau collects it quarterly.

Q. Quarterly?

A. Yes.

Trial Examiner Norwood: Now is it confidential when you send it to the Association?

The Witness: Yes, sir.

Trial Examiner Norwood: And confidential, when you send it to the Bureau of Mines?

The Witness: Yes.

1084 By Mr. Wright:

Q. Is such information disseminated by any other individual or agency?

A. Not to my knowledge.

Q. Mr. McCarthy, will you state, as to dry basic carbonate, dry lead sulfate, white-lead-in-oil, dry red lead, dry lead-in-oil, and litharge, the percentage of the sales of the National Lead Company during the year 1943 to the total of such sales by the industry?

Mr. Ewing: I object to that question. It is similar to the prior question, and I advise the witness not to answer it.

Trial Examiner Norwood: I instruct the witness to answer the question. His counsel advises that he need not answer it.

Proceed with the examination. The counsel know their remedy.

Mr. Ewing: I advise him not to answer.

By Mr. Wright:

Q. Will you answer the question, Mr. McCarthy?

A. No, the same reason because those total figures are known to other people in the industry, and my ratio figures then apply. It would give them the identical information that I prefer not to answer.

Mr. Wright: I move to strike that answer as not responsive to the question.

Trial Examiner Norwood: Read the question again.

(Question read by the reporter.)

1085 Mr. Wright: Your Honor I amend my motion to strike to make it strike all after the word "no."

Mr. Ewing: I think I am entitled to have his reason under the circumstances.

Trial Examiner Norwood: It might stand there for the information of the court.

Mr. Wright: I submit your Honor if that information is to be in the record I don't like it to be in response to a question of mine.

Trial Examiner Norwood: Read the answer again.

(The reporter again read the answer.)

Trial Examiner Norwood: I think he has a point there. I will allow the motion to strike everything after the word "reason" there. And the answer will be to stand to this effect, "No, for the same reason."

By Mr. Wright:

Q. Mr. McCarthy, do you recall supplying information concerning freight rates on various lead pigments to representatives of the Commission in connection with an investigation of the National Lead Company?

A. I do.

Q. Are you able to state whether the freight rates actually used in the shipment of lead pigments from the National Lead Company to destination of the customer would be the same on red lead-in-oil or dry red lead or
1086 litharge when packed in 100 pound steel kegs as the rates applicable to white lead-in-oil or dry white lead when packed in 100 pound steel kegs?

A. I believe they are in the same freight classification.

Q. In other words, they would be the same commodity classification for rate making purposes?

A. I am not a traffic man but I believe they would be.

Q. And would carry the same rate?

A. Yes, sir.

Q. Now as to lead pigments such as red lead or litharge when shipped in barrels or bags, both less than carload and carload, would the rates on those products be in the same commodity classification and be the same as the rates on white lead when shipped in barrels or bags in the same quantities to the same points?

A. I believe they would be.

Q. Mr. McCarthy, are you familiar with the invoicing practice of the various branches of the National Lead Company in connection with handling transportation in lead pigments?

A. Yes.

Q. In connection with invoices covering a sale and shipment of a lead pigment would such an invoice carry on its face the date of the customer's order?

A. On some products it would.

Q. What products would you say?

1087 A. In the main products other than white lead-in-oil.

Q. Do I understand your answer to be then that it would cover all other lead pigments other than white lead?

A. Normally.

Q. Would such invoices on such products also have entered upon them the date of shipment to the customer?

A. Yes.

Q. Will you state whether in normal times shipments of lead pigments are made within a few days of the time the order is received by National Lead Company?

Mr. DuBose: If your Honor please, we make the same objection that was made in Washington on behalf of counsel for the Sherwin-Williams Company, I believe, on the ground that this is not the best evidence.

The invoices themselves would show in the case that Mr. McCarthy has given of the sales other than white lead, the date of the customer's order, and I believe that this is on all fours with the same question as the witnesses were asked in Washington which your Honor sustained.

Mr. Wright: There we had an attorney-examiner for the Federal Trade Commission testifying, and we had the manager of the trade sales of the National Lead Company who has already stated that he is familiar with the invoicing and shipping practices of the National Lead Company and who was, prior to his present position, a branch

1088 manager of the Cincinnati branch.

Trial Examiner Norwood: That other question was directed to what the invoices show and this one is directed to what is the custom of his company and what is his custom in making the shipments.

Mr. DuBose: Could we have the question read again?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. Will you state whether in normal times shipments of lead pigments are made within a few days of the time the order is received by National Lead Company?")

Mr. DuBose: I again state that the best evidence would be the invoices themselves which would show the date of the order.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: During normal times, yes.

By Mr. Wright:

Q. Would you consider that, say, the first three months of 1941 were normal times as to which that answer would be yes?

Mr. DuBose: The same objection.

Trial Examiner Norwood: Overruled.

The Witness: That was a comparatively normal 1089 period.

By Mr. Wright:

Q. In other words, as I understand your answer it is to the effect that in the year 1941 if an order was received by the National Lead Company for pigments, it would be shipped as quickly as possible by the National Lead Company to the customer providing the customer wanted shipment that way?

A. Yes.

Q. And how long a time would you estimate that would be in the ordinary case?

Mr. DuBose: We have the same objection to this whole line of questioning, I take it?

Trial Examiner Norwood: Yes. Counsel has an automatic exception. The same ruling applies.

The Witness: I would say as soon as possible.

By Mr. Wright:

Q. Would that be several days, a week, two weeks, three weeks, a month? Can you give any estimate?

A. Normally for reasons of service to customers our people would try to get the order out the same day if possible.

Q. It wouldn't run over a week then as a general matter, unless there were some unusual circumstances between the time the order was received and the time of shipment?

A. Not normally.

Q. Mr. McCarthy, will you state as briefly as you
1090 can the method of marketing white lead-in-oil, dry white lead, red lead-in-oil, dry red lead in 100 pound kegs or smaller packages through the San Francisco branch of the National Lead Company?

A. During what period, Mr. Wright?

Q. Well, say the year 1943. I mean by that to explain any zones within which there would be price differentials and describe as well as you can the territorial limit of those zones, the differentials that apply to them, the quantity discounts and the trade discounts that are applicable.

Mr. DuBose: That is a rather involved question, your Honor. It involves about six or seven ideas.

Mr. Wright: I am asking for a narrative answer here as much as we can get it.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. Mr. McCarthy, will you state as briefly as you can the method of marketing white lead-in-oil, dry white lead, red lead-in-oil, dry red lead in 100 pound kegs or smaller packages through the San Francisco branch of the National Lead Company?")

Trial Examiner Norwood: I overrule the objection and ask the witness to answer that if he feels that he can.

The Witness: All of those package products have
1091 always been sold outright and never consigned by the Pacific Coast branch of the National Lead Company which manufactures in San Francisco and has divisional sales offices in Seattle, San Francisco and Los Angeles with warehouses in conjunction with these divisional offices.

These products were priced on the basis of quantities taken in single deliveries, the differences in price reflecting the freight rates in effect. The par territory or base territory on the Coast is the San Francisco Bay area.

And from my limited knowledge of West Coast operations, I believe the Commission's exhibit of the map in the complaint shows the zone in effect on the Coast.

By Mr. Wright:

Q. You would say then that that map represents an accurate description of the territorial extent of those ones on the Pacific Coast?

A. To my knowledge, Mr. Wright.

Q. What trade discounts were in force on the Pacific Coast during 1943?

A. Frankly, I don't know. Our West Coast operation is somewhat different than our other branches because of the distance.

Q. In connection now with the sale of dry pigments which would be dry white, both carbonate and sul-
1092 phate, dry lead and litharge, is there any difference between the way such pigments are handled on the Pacific Coast and the way such pigments are handled throughout the rest of the country?

A. No, sir.

Mr. Wright: May we take a short recess, your Honor?

Trial Examiner Norwood: Yes. We will take a short recess at this time.

(Short recess.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. McCarthy, do you recall that Mr. Robert T. Dunn of the Federal Trade Commission conversed with you on a number of occasions during the past few years in connection with an inquiry in this case?

A. Yes.

Q. Do you recall that you furnished him with a number of documents in connection with his investigation?

A. Everything that he asked for.

Mr. Wright: Mark these for identification as Commission's exhibits 807-A through L.

(The papers referred to were marked Commission's Exhibits 807-A, 807-B, 807-C, 807-D, 807-E, 807-F, 807-G, 807-H, 807-I, 807-J, 807-K, 807-L, for identification.)

1093 By Mr. Wright:

Q. I show you documents marked for identifications as Commission's exhibits 807-A through L and ask you if you remember those documents?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

The Witness: This data is explanatory material showing the territorial boundaries in the white lead division between the branches of the National Lead Company.

By Mr. Wright:

Q. That was furnished to Mr. Dunn by yourself as being that information?

A. That is right.

Q. And can you state what period of time to which that is applicable?

A. I would say that it is currently in effect and has been in effect for at least the last 10 years.

Mr. Wright: Your Honor, I offer Commission's exhibits 807-A through L in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: Might I ask the witness one question with respect to a notation that appears on the documents marked as Commission's exhibit for identification 807-B, C, D, and E?

1094 Trial Examiner Norwood: Certainly.

Mr. Ewing: On the bottom of each, Mr. McCarthy, I notice the notation change 5/1/40 and in view of your last answer, will you tell us what that means?

The Witness: In May of 1940, there was a slight revision of common boundary between the Cleveland, Cincinnati and Pittsburgh branches.

Mr. Ewing: With respect to exhibit 807-L for identification, I call your attention to the notation "revised May 1, 1939". Does that apply to all of these documents constituting Commission's exhibit 807-A to L inclusive?

The Witness: Yes.

Mr. Ewing: No objection.

Trial Examiner Norwood: They will be received as Commission's exhibits 807-A through L.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 807-A, 807-B, 807-C, 807-D, 807-E, 807-F, 807-G, 807-H, 807-I, 807-J, 807-K, 807-L, were received in evidence.)

By Mr. Wright:

Q. Do I understand it then, Mr. McCarthy, that this is a description of the boundaries of the various branch offices of the National Lead Company showing the territories in which they handle business in white lead-in-oil?

1095 A. That is correct.

Q. In other words, an order which was received from a customer who would be within the territorial limits described on exhibit 807-A under St. Louis branch, that business would be handled through the St. Louis office?

A. That is right.

Q. Mr. McCarthy, do you recall any transactions between the National Lead Company and Diemont-Levy Company of 57 Portland Street, Boston, Massachusetts?

A. It is my understanding that that concern—

Mr. Ewing: (Interposing) I would like the question to be read again.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. Mr. McCarthy, do you recall any transactions between the National Lead Company and Diemont-Levy Company of 57 Portland Street, Boston, Massachusetts?")

Trial Examiner Norwood: Answer the question.

The Witness: It is my understanding that they were a white lead-in-oil agent of ours and a customer on other paint products for quite a period of time.

By Mr. Wright:

Q. You say they were a white lead-in-oil agent. 1096 You mean there was a contractual relationship between the National Lead Company and Diemont-Levy of ageney consignment for the sale of white lead-in-oil?

A. That is correct.

Q. Mr. McCarthy, I hand you documents which were marked for identification as Commission's exhibit 806-A to J which were produced by Mr. Ewing this morning in response to a subpoena, and I ask you to state what those documents are if you can (handing to witness)?

A. These are cards issued by our Atlantic branch announcing changes in price on lead pigments and lead oxides over a period of the last 10 or 12 years.

Q. Do those represent quotations on such lead pigments by the National Lead Company as of the dates that they are marked?

A. Yes, they do.

Q. Can you state to what territories or destinations those cards are applicable?

A. Throughout the territory served by the Atlantic Branch.

Q. Are those all from the Atlantic branch?

A. Yes.

Mr. Wright: I offer Commission's exhibits 806-A to J in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: Might I ask a question concerning
1097 these documents?

Trial Examiner Norwood: Certainly.

Mr. Ewing: I show you the cards which have been marked Commission's exhibits for identification 806-B, C, E, F, and G, and I call your attention to the fact that on the back of exhibit 806-B and on the face of 806-C, E and F, and on the face of exhibit 806-G, certain notations in pencil appear and I ask you whether you know anything about the origin of those pencil notations or how they came to be upon the cards?

The Witness: Exhibit 806-E, C and F appear to bear in chronological order by date of change pig lead prices in effect on those dates shown.

Mr. Ewing: Do you know how those notations came to be on the cards?

The Witness: I assume that the person from whom they were secured —

Mr. Ewing: (Interposing) I move to strike the answer. Do you know how they came to be on the cards?

The Witness: No.

Trial Examiner Norwood: Strike that speculation in there. Read the answer.

(Whereupon, the reporter read the answer as follows:

"A. I assume that the person from whom they
1098 were secured—")

Trial Examiner Norwood: The motion is allowed to strike those words.

Mr. Ewing: I have no objection to the receipt of the cards marked Commission's exhibits 806-A to J inclusive in evidence except insofar as the pencil notations which appear on the cards I do object to.

Mr. MacIntyre: We contend that those should be received. They were on the cards when National produced them under subpoena. The witness has stated what the notations are.

Now as to who put them on there in the organization of National, I don't think that since that isn't shown that there is any basis for having the notations stricken.

Mr. Ewing: I believe the witness stated his belief as to what the notations were. But not knowing who put them on and how they got there, I submit that they should not be received.

Mr. Wright: Your Honor, I submit that they should be received as they have been identified in the record.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits as they are. But if it appears later that anything is wrong about those notations, why we can strike them later.

(The papers referred to, heretofore marked for
1099 identification COMMISSION'S EXHIBITS 806-A, 806-B, 806-C, 806-D, 806-E, 806-F, 806-G, 806-H, 806-I, 806-J, were received in evidence.)

By Mr. Wright:

Q. Mr. McCarthy, are the sales of lead pigments by the National Lead Company generally made at the published prices and announcements of the National Lead Company over the period of your experience with the company?

A. Definitely.

Mr. Wright: I have no further questions, your Honor.

Trial Examiner Norwood: Cross examination.

Mr. Ewing: No cross examination.

Trial Examiner Norwood: Thank you, Mr. McCarthy. The witness is discharged except as he may be recalled by the District Judge at a later date.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed. Call your next witness.

Mr. MacIntyre: We would now like to call on Mr. Harold Rowe of the National Lead Company as the next witness for the Commission.

HAROLD ROWE was thereupon called as a witness
1100 for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

Q. Mr. Rowe, will you state your full name for the record.

A. Harold Rowe.

Q. What is your business, Mr. Rowe? What is the nature of your occupation in business?

A. I am with the National Lead Company.

Q. At what address?

A. 111 Broadway, New York City.

Q. That is the general office, is it, of the National Lead Company?

A. Yes.

Q. And what position do you hold with the National Lead Company?

A. I am one of five vice-presidents.

Q. What are your duties and responsibilities in your position as one of the vice-presidents of the National Lead Company?

A. They are varied. I am a member of the executive committee and a member of the Board of Directors, and more or less in a supervisory capacity in the paint end of the business, paint products, and to a lesser extent of all pigments.

1101 Q. That is, you include in your duties the supervision of the pigments divisions? That is, the sales of the pigments by the pigments division of the National Lead Company; is that correct?

A. It depends on what you mean by supervision. We don't operate the sales directly from our office for all of the branches as we operate through branches which are to a considerable extent independent of the main office.

Q. Nevertheless those that do handle those sales of pigments are subordinate to you; is that correct?

A. That's right.

Q. And as to policy making concerning methods used in those sales, you participate; is that correct?

A. Yes.

Q. How long have you held that position, Mr. Rowe?

A. Since March, 1933, I think. I beg your pardon. If you are speaking of vice-president, director and member of the executive committee that isn't true.

Q. Over what period then is it true that you have held such position?

A. I cannot give you the date, I am sorry.

Q. Well, approximately.

A. It is somewhere around 1938, I think. But I would have to check it, I am sorry.

Q. I show you a document heretofore marked for 1102 identification as Commission's Exhibit 538 and I ask you to state what that is (handing to witness)?

A. It is an answer to a letter from Mr. Reque to me. Mr. Reque who was assistant manager and is the assist-

ant manager of our Chicago branch—it is an answer to a letter that he wrote me and it is my reply.

Q. And under what date?

A. April 8, 1941.

Q. In your making that reply to him, you did so in your official capacity which you have just described to us; is that correct?

A. Before I could answer the letter I would have to see a copy of his letter to me and previous correspondence.

Q. Your handling of this reply to him though was in your official capacity as one of the officials of the National Lead Company?

A. Yes.

Q. And in the capacities that you have already outlined to us that you filled at that time; is that correct?

A. Yes.

Q. And to Mr. Reque as it is in his official capacity as assistant manager of that branch?

A. Yes, that is correct.

Q. I note that—

Mr. MacIntyre: I want to offer this document 1103 into the record please.

Mr. Ewing: I will object on the ground that it is irrelevant and immaterial.

Trial Examiner Norwood: The objection is overruled and it is received as marked.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 538, was received in evidence.)

By Mr. MacIntyre:

Q. Mr. Rowe, I notice that in this document, Commission's exhibit 538, you state that you have noticed an article on page 4 of the Oil, Paint and Drug Reporter for the week of April 8, 1941 and in which the DuPont Company had announced a change in its policy to become effective on orders received after May 1st.

Is that the first information that you had concerning that announcement of that change in the policy of the DuPont Company on that item?

A. You mean the article in the Oil, Paint and Drug Reporter?

Q. Yes.

A. Yes.

Q. You are certain that that was your first information of that change?

A. Unless I was told of the article by someone else who had called it to my attention.

1104 Q. The article would have been your first information then?

A. Yes, sir.

Q. You are certain of that?

A. I am.

Q. Do you recall any other instances in which you advised officials subordinate to you in the same department of the National Lead Company concerning announcements of changes in policies by other sellers of products in which National Lead is interested and such announcements you noticed in the Oil, Paint and Drug Reporter?

Mr. Ewing: I object to it as irrelevant.

Trial Examiner Norwood: Objection overruled.

By Mr. MacIntyre:

Q. In other words, is this the only instance of its kind?

A. Well, I am not clear on what kind this is. This letter is in reply and refers to two previous letters and without seeing those and refreshing my mind on what was in them, I can't properly answer the question.

Q. Well, what is this Oil, Paint and Drug Reporter that is referred to in the letter by you?

A. A trade magazine which is published here in New York once a week, a market magazine, and has been published for, I think, 50 years or more.

It is a recognized magazine in the paint and

1105 chemical industry.

Q. Are you a subscriber to it?

A. Our company has been for years.

Q. And it comes to your desk in connection with that subscription?

A. Yes.

Q. For what purpose?

A. More than one copy of it. We get a number of copies.

Q. Why is it sent to your desk in connection with the subscription of your company?

Mr. Ewing: I will object to it.

The Witness: That is not a fact.

Trial Examiner Norwood: The objection is overruled. Explain that.

The Witness: We get a number of copies in our company and I get one of them.

By Mr. MacIntyre:

Q. Well, why does one copy come to your desk in connection with the subscription?

Trial Examiner Norwood: Off the record.

(Discussion off the record)

Trial Examiner Norwood: Proceed.

A. The magazine contains trade news of all sorts and I read it, not regularly, but whenever I have time to keep up with the news of the industry.

1106 By Mr. MacIntyre:

Q. Have you noted a section of it under the title "Current Market Quotations on Lead Pigments?"

A. I have noted it?

Q. In your reading of it, have you noted a section devoted to purported current market quotations on lead pigments?

A. There is a section of several pages which covers quotations on chemicals and many, many items and I believe it has a section on lead pigments. I haven't looked at it for, I guess, a number of years.

Q. In addition to your subscription to and for a number of copies of this publication, is it a fact, Mr. Rowe, that your company has additional relationships with that publication?

Mr. Ewing: I will object to that. Is Mr. MacIntyre claiming that we own this trade magazine?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. In addition to your subscription to and for a number of copies of this publication, is it a fact, Mr. Rowe, that your company has additional relationship with that publication?")

Trial Examiner Norwood: He has a theory that this is used to pass around prices to the respondent and so on, isn't that correct; Mr. MacIntyre?

1107 Mr. MacIntyre: I haven't stated that as a theory of mine. I think the facts as thus stated by Mr. Rowe are clear now as a matter of record.

Trial Examiner Norwood: I think that the complaint charges that that is used as a medium, doesn't it?

Mr. MacIntyre: There is a charge in the complaint that these respondents disseminate price information.

Trial Examiner Norwood: I think he can bring out any facts with respect to that magazine.

Mr. Ewing: I object to the form of the question.

Trial Examiner Norwood: You mean it is leading and indefinite. Read the question again.

(The reporter again read the question.)

Mr. MacIntyre: I will withdraw that question.

Trial Examiner Norwood: All right, proceed.

By Mr. MacIntyre:

Q. Mr. Rowe, to your knowledge does your company buy considerable advertising space in this magazine?

Mr. Ewing: I will object to that, if your Honor please, as not being material.

Trial Examiner Norwood: Objection overruled.

Mr. Ewing: I will also object to the form of the question because it includes the word "considerable."

Trial Examiner Norwood: I think he can clarify that. Proceed.

1108 The Witness: Can I have the question please?

Trial Examiner Norwood: Read the question again.

(Whereupon, the reporter read the question as follows:

"Q. Mr. Rowe, to your knowledge does your company buy considerable advertising space in this magazine?")

The Witness: I will have to ask what you mean by considerable?

Mr. MacIntyre: Well, do you buy any space?

The Witness: Yes.

By Mr. MacIntyre:

Q. Do you buy it regularly?

A. I think we have an advertisement once a month in the weekly magazine.

Q. What products do you advertise in it?

A. I can't answer that. We advertise white lead in some of the advertisements, I know.

Q. That is the Dutch Boy White Lead?

A. More probably dry white lead because it is a magazine that goes to paint grinders.

Mr. MacIntyre: If your Honor please, I would like to ask that we recess until about 1:30 and I want to say that we have an understanding with Mr. Ewing that we may withdraw Mr. Rowe, for a witness who will be ready to take the stand at 1:30. That is for a few minutes, 1109 and then we will ask Mr. Rowe to take the stand and resume his testimony.

Trial Examiner Norwood: That may be done. We will recess until 1:30.

(Whereupon at 12:30 p. m., a recess was taken until 1:30, this day.)

1110 Afternoon Session.

1:45 P. M.

Trial Examiner Norwood: Come to order. You may proceed.

Mr. Wright: Your Honor, I would like to call Mr. Auchincloss as a witness for the Commission.

WILLIAM S. AUCHINCLOSS, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name and occupation?

A. William S. Auchincloss, president and treasurer of the Schnell Publishing Inc.

Q. What is the address of the Schnell Publishing Company?

A. 59 John Street, New York City.

Q. What is the business of the Schnell Publishing Company?

A. Publishing business publications.

Q. Does the Schnell Publishing Company publish the Oil, Paint and Drug Reporter?

A. It does.

Q. How long has the Oil, Paint and Drug Reporter been published by the Schnell Publishing Company?

A. Since April of 1941.

1111 Q. Prior to that time who published it?

A. It was published by the Oil, Paint and Drug Publishing Company. That was a part of the Estate of the founder of the publisher, William O. Allison.

Q. Who is the principal party in interest in the Oil, Paint and Drug Publishing Company?

A. The Estate of William O. Allison. Allison founded the paper in 1871. He died in 1925, and his estate operated the publication under Court order until such time as it could be profitably sold.

Q. Was the Schnell Publishing Company organized to take over that business in 1941?

A. Yes, Mr. Schnell bought the Oil, Paint and Drug Reporter from the Estate of William O. Allison, and formed the Schnell Publishing Company to operate the Oil, Paint and Drug Reporter, and the other magazine.

Q. Was Mr. Schnell connected with the Oil, Paint and Drug Publishing Company prior to that time?

A. Since 1890, when he went with Mr. Allison as a boy of fifteen.

Q. And is Mr. Schnell still connected with the Oil, Paint & Drug Reporter?

A. Mr. Schnell died November 29, 1942.

Q. How long have you been connected with the publication of the Oil, Paint and Drug Reporter?

1112 A. I first went with the company, the previous company in October of 1926, as I recall.

Q. Would you say then, that there has been a direct succession of ownership of the publishing of the paper for a great many years.

A. Pardon my laugh, the excess profits tax people won't admit that, but I would say so.

Q. Can you briefly describe what the Oil, Paint and Drug Reporter publication is?

A. It is a weekly magazine published on very close weekly schedule, to record prices, market conditions, and news of the industries that either produce, convert or compound in processes chemicals, oils and drugs. It quotes on three or four thousand prices of those materials weekly. That, we regard as its big function.

Q. Is the magazine circulated only to subscribers, or does it also have newsstand sales?

A. No, it has no newsstand sales. It is circulated ex-

clusively to paid subscribers, and it is a member of the Audit Bureau of Circulation.

Q. Do you know generally who the subscribers are to the publication, such as general classes or groups?

A. No, because only about 2% of our subscriptions bear any individual names. The rest are company subscriptions.

Q. Do you have any way of classifying roughly
1113 the companies as to their businesses, who are subscribers?

A. As to their industrial occupations?

Q. Yes.

A. We don't make any attempt to do that, because so many of them in the chemical field, particularly, engage in so many different industrial activities. Roughly you can classify them as the process industries. The rubber, pharmaceutical, paper, glass, paint, and what have you. It just runs through—fertilizers—

Q. (Interposing.) Would it be fair to state that the circulation is made up principally of people who purchase and use the products which are covered by the publication?

A. That is a hard one to answer, sir, because a good portion of our subscription is in the chemical field, and these chemical firms do buy these materials, and they also sell the materials.

Q. I see. Then it would also include producers, and I believe you have already stated that for the record?

A. Yes.

Q. Does the Oil, Paint and Drug Reporter publish such market information as you have described, with reference to pigment and paint materials generally?

A. Yes.

Q. Does it publish such information with regard to lead pigments such as white lead, red lead, litharge, lead sulphate?

1114 A. Yes.

Q. Is the National Lead Company, do you know, a regular advertiser in the Oil, Paint and Drug Reporter?

Mr. Ewing: I will object to that, if your Honor please.

Trial Examiner Norwood: Read the question please.

(Question read.)

Mr. Ewing: Your Honor, I object to it as irrelevant and immaterial.

Trial Examiner Norwood: Overruled. Let him answer. Answer the question.

The Witness: Yes, they are an advertiser.

By Mr. Wright:

Q. I ask you the same question with reference to the Eagle-Picher Company?

A. No, Eagle-Picher do not advertise in the Oil, Paint and Drug Reporter.

Q. I ask you the same question with reference to the Anaconda Copper Mining Company?

A. No, they do not advertise in the Oil, Paint and Drug Reporter.

Q. I believe you stated earlier that the Oil, Paint and Drug Reporter publishes weekly market information regarding prices and market conditions generally, as to these various products, including lead pigment?

1115 Q. Can you tell me how much information is secured by the O Paint and Drug Reporter.

Mr. Ewing: I will object to that, if your Honor please. It makes no difference how they get it.

Trial Examiner Norwood: I think that would tend to connect it up with this case. It is dangling so far.

Mr. Hinds: I would like to add a ground to that objection, that this proceeding, as I undestand it, is not an investigation. That is a matter for investigators to trace. This witness is virtually being asked: Where can I get competent evidence on this subject matter? That is not a proper function of this tribunal, to find out where he can get competent evidence. Certainly, any evidence this witness could give couldn't conceivably have any competency, because it would be hearsay. And what he can tell us on how to get competent evidence should be whispered to the ear of the Commission's attorney, not brought out taking our time and expense in this proceeding.

Mr. Wright: Your Honor, I submit that the testimony of this witness, which the witness is bringing out, and which he will bring out, is competent and relevant, and that the information which we requested in the last question is competent and relevant, if he knows.

Trial Examiner Norwood: They are trying to cause it to transpire. The objection is overruled.

1116 The Witness: We have a staff today of seven men —a man just left us last week—who are engaged in reportorial activities in all the fields producing these materials. We have correspondents in Chicago, Atlanta, Baltimore and several other process centers, where certain of these materials are produced. The markets or products

falling into various rough market classifications that we have made, somewhat empirically, and these are assigned to individual reporters. One man will cover a couple of markets or, in one case, three; and he will circulate among the more substantial producers of these materials to find out from them what they are quoting, their individual prices, and what their individual concept of market conditions will be.

Then, balancing the reports that he gets from various individuals, he writes his weekly comment and arranges his weekly range of prices.

Q. Now, is that statement you have just made applicable to, for instance, market quotations and market news, with reference to lead pigment?

A. Yes.

Q. Is there one man generally who handles collection and writing up of the market information on lead pigments?

A. Yes, that gentleman spends—although two of our fellows would have direct supervision over him, and
1117 the editor also would have his own copies and would be picking up things as well.

Q. Now, can you tell me who, if you know, what sources of information utilized by your staff in gathering market information on lead pigment—I mean by that the names of any companies or individuals from whom such information would be secured.

A. I understand that we check at present with St. Joseph Lead Company, International Lead Company, the American Smelting and Refining Company, I believe, and one or two others.

Q. Did you understand my question? I meant to limit that to lead pigments?

A. Lead pigments?

Q. Yes.

A. Yes, I believe that is all right. Lead pigments, of course, St. Joe wouldn't come in.

Q. Would American Smelting and Refining Company be a source?

A. That I don't know; I am classifying the whole lead

Q. (Interposing.) Is such information ever secured from the Lead Industries Association?

A. Background information on the market would be secured from them, possibly some market developments.

A man up there would mention it to our men, and he would check through. You see, whenever we get a price
1118 change, as a matter of policy, we always check up with other suppliers to confirm the story.

Q. I believe you stated that this publication has been published since 1871?

A. That is correct.

Q. And it has been a trade paper in a sense since that time?

A. Yes.

Q. I suppose at times mistakes are made in market quotations that are published by the Oil, Paint and Drug Reporter?

A. Yes, compositors and reporters being what they are, we occasionally make mistakes.

Q. Does that happen very often?

A. No, we cover a broad field. I don't think it happens very often, but we do have mistakes there—we are bound to.

Q. Do you recall any mistakes that have been made in the reporting of market conditions and quotations in lead pigments?

Mr. Ewing: I will object, if your Honor please. It is wholly irrelevant and immaterial.

Mr. Hinds: I want to add to that objection the ground that it is no more competent for this gentleman to set up a standard by which he could compare his mistakes, than it would be to state the information originally; and obviously, it would be incompetent in either case.

1119 Trial Examiner Norwood: Objection overruled.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

The Witness: I am not able to put my fingers on it at the moment, but I try to forget our errors as fast as I can.

By Mr. Wright:

Q. When such errors are made, they are usually called to your attention, are they not?

A. Yes.

Q. By subscribers or others?

A. Yes, quite frequently by subscribers. When we find it is the compositors who put the wrong price in the line, or something like that.

Q. Did the Oil, Paint and Drug Reporter have any connection official connection, with the Code Authority for the paint, varnish and lacquer industry during the period of the National Recovery Act?

Mr. Ewing: If your Honor please, I will object to that on the ground that the Code Authority for the paint, varnish and lacquer industry is not concerned here; we are here concerned with lead pigments.

Mr. Wright: Your Honor, I submit we are dealing with products here which are admitted to be the principal
1120 part of the production of paint, and some of the respondents are large producers of paint, sellers of paint; and this information is relevant.

Mr. Ewing: The charges here relate to lead pigments.

Trial Examiner Norwood: I think, though, that he might complete the picture to show how this journal, this trade journal works.

Mr. Ewing: My point is this, your Honor. All of these respondents, as shown by the evidence offered on behalf of the Commission were engaged in formulating a code relating to the lead pigments, and were not engaged, in so far as this case is concerned, in any way with the paint, lacquer, varnish code.

Now to step outside the field involved in this case, and to go into what may or may not have been the relationship, official or otherwise, between this trade paper, and the paint, varnish and lacquer code, seems to me not only irrelevant and incompetent but wholly immaterial to the issues.

Trial Examiner Norwood: I think that the method of this paper in securing this information, might throw some light on how it secured the information, respecting lead pigments, and so forth.

Mr. Hinds: If your Honor please, counsel for the
1121 Commission has made a statement here on the record that it is admitted that these lead pigments, which are the subject of this prosecution, are the principal ingredient in the manufacture of paint. That is not admitted by the Glidden Company. In fact, it is denied.

Trial Examiner Norwood: I saw it in some of the answers; but then we can take that up later.

The objection is overruled. Let him answer the question.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Did the Oil, Paint & Drug Reporter have any connection, official connection with the Code Authority for the paint, varnish and lacquer industry during the period of the National Recovery Act?")

The Witness: The connection is somewhat vague in my mind. There was a Section 22 in the Paint Code, necessitating the cost basis for the cost of replacement of materials, raw materials.

Now, I think the National Paint, Varnish & Lacquer Association was the collecting medium for things of that kind, and we printed a bulletin to them which was used by the paint industry for establishing the cost of replacement in raw materials. Whether our connection was definitely with the Code Authority of that industry, I am
1122 at little too dim on it.

By Mr. Wright:

Q. Do you recall whether that association acted with the Code Authority?

Mr. Ewing: If your Honor please, I will make the same objection.

Trial Examiner Norwood: Overruled.

The Witness: No, I don't recall whether they acted with the Code Authority.

By Mr. Wright:

Q. Mr. Auchincloss, did you produce certain documents here this morning under subpoena?

A. Yes.

Q. Do you have those documents with you?

A. I do.

Mr. Wright: I would like to have some exhibits marked for identification, if we may.

(The papers referred to were marked Commission's Exhibits 808-A, 808-B, 808-C, 808-D, 808-E, 808-F, 808-G, 808-H, 808-I, 808-J, 808-K, 808-L, 808-M and 808-N for identification.)

By Mr. Wright:

Q. Did you produce the original issue of the Oil, Paint & Drug Reporter for May 28, 1934?

1123 A. Yes, sir.

Q. For June 4, 1934?

A. Yes.

Q. For June 11, 1934?
A. Yes.
Q. For June 18, 1934?
A. Yes.
Q. And for August 27, 1934?
A. Yes.
Q. I hand you herewith documents which have been marked Commission's Exhibits 808-A through N, and ask you to state if you recognize that?
A. I recognize it somewhat.
Q. What do you recognize it as?
A. A page from the Oil, Paint & Drug Reporter in this case for May 28, 1934.
Q. I call your attention to the initial "A", appearing in the upper lefthand corner—
A. (Interposing.) That's correct, I put it there.
Q. You state that you put the initial there?
A. Yes.
Q. Did you compare that Exhibit 808-A with the original page in the Oil, Paint & Drug Reporter?
A. Yes.
Q. Of that date?
A. Yes.
Q. I now call your attention to documents marked Commission's Exhibits for identification 808-B through N, and ask you to state with reference to those exhibits whether you recognize them as having been compared with the original pages of those dates in the Oil, Paint & Drug Reporter?
A. They have been so compared.
Q. And you found those, did you, to be true copies of the original pages of those dates?
A. Yes.
Mr. Wright: Your Honor, I offer Commission's Exhibits 808-A through N into evidence.
Mr. Ewing: May we go off the record, please?
Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Trial Examiner Norwood: On the record.
Let Mr. Wright complete his proffer modified as he has suggested.
Mr. Wright: Your Honor, I am proffering these exhibits to show current market quotations and market information of the dates of the issues involved.

I might say, as to 808-A, that the purpose of that sheet, while it does not relate in particular to any lead pigment, or lead products, shows the heading under which the publication publishes these market prices, which gives
1125 meaning to the documents themselves, which are a part of that section.

Mr. Hinds: If your Honor please, I shall ask the privilege of preliminary cross-examination in order to adduce facts concerning these documents which should be the basis of further objection.

But at this time my objection in part, even as it is now disclosed, is that this is objectionable in that it does not purport to be evidence of market prices, and I don't think it possibly could. It purports to be only evidence of market quotations, or, as counsel has said, market information.

Market quotations, I think, have no legal significance whatsoever. Market information is at best hearsay. So on that ground alone, I think it is incompetent and inadmissible as hearsay.

Quotations are interested in market prices, value, which may be shown, as far as I know, only by two means: Either by the opinion of a qualified expert, or by actual sales or bids or offers. That is well-established.

Trial Examiner Norwood: Does counsel want to question the witness on matters only pertaining to this identification, as to whether those were the actual market prices or not; I don't think you may go into that at this time.

You may ask him anything; but you have already
1126 stated your objection and I hardly think it is necessary to ask any more questions.

Mr. Hinds: Well, if it will be conceded by counsel, or even impliedly conceded, that this does not even hope for or expect to establish the market prices, then I will have accomplished by that concession what I would have hoped to accomplish by an examination.

Is that conceded? Is that the purpose here—not to establish the market prices, but merely what counsel has referred to as market quotations, or market information.

Mr. MacIntyre: It is the purpose of this, to show that through this publication there was disseminated this information concerning what purports to be current market quotations. And I want to call your Honor's attention to the charges in the complaint that are directed expressly to the matter of quotations as distinguished from prices.

Mr. Hinds: The Commission, of course, can't enlarge the rules of evidence, or make evidence which is irrelevant and incompetent into something relevant or competent by what they put in a complaint. I assume we are governed here by law, and not by charges.

Now, counsel, I have asked several times: Is this not for the purpose of showing market prices? If it is conceded that that is not its purpose, then I will be saved from
1127 the necessity of any preliminary cross-examination.

Your Honor, he has not answered my question. I don't know why he evades the question.

Trial Examiner Norwood: Is there any further objection?

Mr. Hinds: Your Honor, may I ask counsel whether this is to show market prices?

Trial Examiner Norwood: He has already stated what it shows. I think if you will look at the record, you will see it.

Mr. Hinds: Then am I to assume it does not disclose market prices? There not being any answer to that, I shall have to ask for preliminary cross-examination.

Trial Examiner Norwood: Counsel objects, does he?

Mr. Hinds: I don't know yet whether I will object on that question until I have had the opportunity of preliminary cross-examination. It may or may not disclose a basis for an objection on that ground. I have already made my objection on the other grounds that have already been evident.

Trial Examiner Norwood: Is there any further objection?

Mr. Hinds: Now you may ask a few preliminary questions, restricted to identification of these documents,
1128 not to the contents, but to the whole.

Mr. Wright: Your Honor, may we take a recess while the counsel are examining the papers?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

Cross-Examination by Mr. Hinds.

Q. I note that on certain pages, for example, pages 30 of the issue, June 4, 1934, there is set forth what purports to be prices, namely, lead prices, and zinc prices, is that right?

A. That is correct.

Q. And those purport to be card prices on actual sales of commodities at or about that day?

Mr. Wright: Your Honor, I object to the counsel going into the content of those documents, rather than identification.

Trial Examiner Norwood: Yes, I ask you to confine your voir dire questions to the matter of identification only.

Mr. Hinds: If your Honor please, I only want to find out what they purport to be, so that I can base my objection on it.

1129 Trial Examiner Norwood: You can read that and see what it purports to be.

By Mr. Hinds:

Q. Does this document purport to show any prices based on actual sales as distinguished from quotations with respect to lead pigments?

Trial Examiner Norwood: I don't think that I would adopt that as a voir dire question there, because the question was directed to what they purport to be. That is the very meaning of the word "purport." This witness cannot tell you that.

Mr. Hinds: If your Honor please, I have been handed a large number of sheets here—

Trial Examiner Norwood: (Interposing.) You may cross-examine him later on the contents; but not now.

Mr. Hinds: I will respectfully except to your Honor's overruling my further preliminary cross-examination; and I shall then be obliged to make my objection, as well as I can on the basis of the limited information I have been able to obtain.

Now I object to it on the ground that, that as I read this paper, it does not even purport to show anything that would be relevant, even if it were competent; namely, it purports to show these lead pigments, as distinguished from lead and zinc, not to show prices based on
1130 actual sales, or even offers or bids in good faith, or even to give expert opinion as to prices; but merely to show what is known as quotations which, of course, is mere hearsay, mere gossip, having no legal competency. I object on that ground.

Trial Examiner Norwood: Is there any further objection?

Mr. Ewing: We will object to it on the ground that the documents proffered are incompetent, irrelevant and immaterial, and particularly upon the ground that the witness has testified that the information of this character obtained by his organization was obtained by reporters employed in his organization, who went out and got that type of information, which was later sifted and edited, compiled and what not, and eventually reproduced to the extent the trade paper did in its publication. That being so, there is nothing whatever to connect any of the respondents with this in any way.

Trial Examiner Norwood: Are there any further objections?

What do you say to that, Mr. Wright?

Mr. Wright: Your Honor, we maintain that they are competent and relevant, and expressions of market conditions as to lead pigments at the times of the publication of the articles as published by what has been established to be a thoroughly reputable and reliable trade paper, which is held in high esteem in the industry.

1131

Mr. Hinds: May I argue briefly in support of my objection?

I won't repeat the objection.

Trial Examiner Norwood: Well, the counsel has already stated his objection.

Mr. Hinds: I stated it, your Honor, but counsel for the commission has argued against my objection. I would like to add just a few words in support of my objection.

Trial Examiner Norwood: Mr. Wright, have you completed your statement?

Mr. Wright: Yes, sir.

Mr. Hinds: I would like to point out, sir, that this is to be distinguished from the stock market so-called prices or quotations which, when reported in reliable publications, are as they purport to be, records of actual sales made during that day. The courts have enlarged the hearsay rule there, so as to allow those as evidence of what prices goods were actually sold at.

My objection is not based on any lack of reliability of this publication, which I have no doubt is highly reliable; but because it does not even purport to be a record of anything that is actually done. It is only a record of

gossip, of information. It is strictly hearsay, because
1132 we don't either have the men who got this information, nor do we have the sources from which they got it.

Mr. MacIntyre: Well, the National Lead Company, of course, if it should have given any mis-information to this man on lead pigments and caused it to be published here, then, of course, it would have to accept the responsibility as a respondent here, for giving that misinformation.

Mr. Hinds: I haven't been given the opportunity of cross-examining this man.

Glidden stands here without any opportunity, either to cross-examine whatever man gave this information, or the man to whom he gave it.

Mr. MacIntyre: Of course, Mr. Hinds has heard of the rule of Admissions.

Mr. Ewing: There is nothing in the record other than the statement that I referred to, that I know of, to show, as to these particular exhibits, from whom any of the information set forth therein was obtained. And while I am not attempting to put words in Mr. Auchincloss's mouth, I have no doubt that if he were asked, where did this particular information come from, actually, he wouldn't know.

Trial Examiner Norwood: Well, I think that the same reasons that render the stock market reports, the newspaper reports that happen in the stock market, admissible, would render these admissible. Any differences
1133 would probably go to the weight. And so I shall overrule the objections and receive them as marked, Commission's Exhibits 808-A through N.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 808-A, 808-B, 808-C, 808-D, 808-E, 808-F, 808-G, 808-H, 808-i, 808-J, 808-K, 808-L, 808-M and 808-N, were received in evidence.)

Mr. Wright: No further questions, your Honor.

1134 *Cross-Examination by Mr. Hinds.*

Q. Mr. Auchincloss, is it possible for you to say from an examination of this exhibit, as to each of the reported quotations of lead pigments, from whom you got that information?

A. No, sir.

Q. So that you couldn't possibly describe it, as Commission's counsel has done, as an admission by any of these respondents, as far as you know?

A. No; purely a reportorial operation.

Q. Now, in my attempted preliminary examination, I tried to bring out that while you don't purport to show actual prices, based on actual sales on lead and zinc, you not purport to show, prices based on actual sales with respect to these lead pigments; is that right?

A. I think that there is a misunderstanding here. Our activities in St. Louis would be no different from our activities in New York. We may say "Spot prices in St. Louis"; but what we mean is spot quotations. But you have got an awful lot of stuff to get in a small area, and we use the prices synonymously.

Q. In other words, when on page 30, June 4, 1934, you used the expression "lead prices and zinc prices," you didn't intend to differentiate between what you gen-
1135 erally describe at the top of the exhibit as "Current market quotations"?

A. No, the current market quotations are our major service. The other is the supplementary.

Q. And both are based on what the people tell you their understanding of what the market is?

A. Correct.

Q. Do you make any investigation as to actual sales?

A. No, we don't go in for sales.

Q. Is there any public market for any commodities whose prices, quotations you report comparable, we will say, to the stock market or the produce market, or any other market?

A. We report some of the prices, of course.

Q. Where buyers and sellers get together on an exchange and publicly and openly make an offer and buy and sell—is there any such market with respect to—

A. (Interposing.) I am not aware of one. We do report, of course, certain materials that are on the produce exchange.

Q. And in those cases, you report the public prices which are publicly and openly arrived at; is that right?

A. Well, our operation is the same practically. You see, there are so many materials in this thing, it is almost impossible to generalize. But the main basis of our operation is simply to go around to talk to reputable suppliers

of these materials and to report what each individual tells us.

1136 Mr. Hinds: Well, now, your Honor, I object. This is obviously hearsay and incompetent. We, being denied the opportunity of cross-examining the people who have told this gentleman's reporters the facts, it does not furnish any exception to the Hearsay Rule, such as the exception cited in the case of the Stock Exchange prices, which, as a matter of convenience, are accepted, because they are a fair substitute for what would be competent evidence, namely, bringing the buyers and the sellers into court.

In real estate, for example, there you get competent evidence of the actual price paid by the buyer and the seller. I submit this does not furnish a proper exception to the otherwise unqualified Hearsay Rule. I object to it on that ground.

Trial Examiner Norwood: Do you think that the newspaper couldn't reliably report the sale of what happened on the Stock Market, without being present when the sale was made?

Mr. Hinds: Your Honor, on the contrary, I have insisted on the distinction there. I say, in the first place, not one, but 500 newspapers throughout the country, and some in London and even in Madrid, report actual sales on the New York Stock Market or the New York Curb Market, or the both markets, each day; and the courts have indulgedly made that an exception to the Hearsay Rule, because

1137 experience shows that they check up on each other and they reliably report actual sales.

But this does not purport to report actual sales. It purports to report mere gossip, mere third hand information or beliefs.

Trial Examiner Norwood: The motion is denied. Proceed.

By Mr. Ewing:

Q. Mr. Auchincloss, am I right in my understanding that in settling the basic material which is later edited and reproduced in the trade paper, your representatives were reporters who go to their various sources of information and seek to obtain and do obtain information from those sources, which is later brought back to the offices and sifted and correlated and edited, and eventually published; so that the final published item may not be the information

actually obtained by the reporter from any particular one of the sources he interviewed?

A. That is quite correct.

Mr. Ewing: No further questions.

Redirect Examination by Mr. Wright.

Q. Mr. Auchincloss, when such information is secured by the sources of information, is it not published substantially to reflect what was told you, or your reporters,
1138 by the sources of information?

A. No, it is difficult to answer, because the reporter might go to one company and get a price change. Let's take an isolated instance, if your Honor will bear with me. The reporter might go to one company and get a price change. It would be his duty immediately to contact any other suppliers of that material in his market, not with the question—is your price meeting the price of so and so—because we never reveal one supplier's name to another, do you see. But with the question "Have you had any changes in the price of this particular material?" Then, what we finally publish would be based on what he found out from all the markets.

Now, that is a perfectionate dream of what we try to do. I hope we do it most of the time.

Q. In other words, the information is to reflect accurately what is happening in the market for that period?

A. That is right.

Q. Now I call your attention to Exhibit 808-E, to the heading "Paint, Varnish, Lacquer Chemicals"; is that a regular department of the Oil, Paint & Drug Reporter, or was it at that time?

A. It was at that time.

Q. Did that same department appear each week?

A. Yes, it is a weekly appearance.

Q. Does the Oil, Paint & Drug Reporter, as pres-
1139 ently published carry a similar department?

A. Yes, "Protective Codings", we call it now.

Q. But it is substantially the same type of information?

A. Substantially the same.

Q. Now, is that intended to further particularize the general market information which appears under the price quotations in that field?

A. Yes, of course it is somewhat of a misnomer. Our market divisions have sort of grown up down through the

years. The heading "Paint, Varnish, and Lacquer Materials and Chemicals" employed then, actually covers a statement of the conditions of materials that are used in practically every process industry. It isn't just applied to the paint trade alone.

Mr. Wright: I see. No further questions.

Trial Examiner Norwood: Does that paper affect the London market?

The Witness: Very much so, sir. It is the chemical field—plastics, pharmaceuticals, rubber, glass, printing—and what you will.

Trial Examiner Norwood: Are there any further questions?

Mr. Ewing: No further questions.

(Witness excused.)

1140 Trial Examiner Norwood: You may call your next witness.

Mr. MacIntyre: We would like to recall Mr. Harold Rowe.

HAROLD ROWE, resumed the stand and testified further as follows:

Direct Examination by Mr. MacIntyre.

Q. Mr. Rowe, before we adjourned for lunch you had related to us the fact that you are vice president of the National Lead Company since about 1938, and with certain duties and responsibilities; do you recall?

A. I said I was one of five vice presidents.

Q. Now, for the period prior to the period you have covered in your testimony, were you connected with the National Lead Company in any capacity?

A. Prior to 1928?

Q. Yes.

A. Yes.

Q. In what capacity?

A. You mean immediately before?

Q. Yes, immediately prior to the period you have been serving as vice president?

A. I think from March 1933, I was Assistant to the President.

1141 Q. And that ran down to the time you became vice president in '38?

A. Yes.

Q. And what were your duties and responsibilities?

A. Well, similar to the ones that I mentioned this morning other than being on the Executive Committee of the Board of Directors.

Q. In other words, your supervision over sales of lead pigments, has not changed—that is, your duties and responsibilities, with respect to the supervision over the sale of lead pigments has not changed since March, 1933; is that correct?

A. That is substantially correct. I mean it was always under the present company, of course.

Q. And in that respect responsible only to him?

A. No, I don't think so.

Q. That is directly?

A. Well, responsible to the Executive Committee of the Board of Directors.

Q. Now, in carrying out your duties and responsibilities in that period of time, from March 1933 to 1938, who was your superior, as the president of the company?

A. Mr. Cornish. No, I guess I am correct in the statement that I was assistant to the president during all of that time. I have forgotten; but I think in March 1933—

I am not sure, Mr. Cornish was Chairman of the
1142 Board, and I don't remember whether Mr. Carter was president in '33, but he became president shortly afterwards. Mr. Carter was president, and Mr. Cornish was Chairman of the Board at that time, or approximately at that time.

Q. From about March '33 down to when?

A. I would have to check the record; I am sorry I can't remember.

Q. Well, Mr. Carter at some date ceased to be president, didn't he?

A. That is correct, yes.

Q. And about when was that?

A. It was somewhere from 1938 to 1940, I guess.

Q. In other words, he ceased to be president of the company on some date during the period from 1938 to '40?

A. That is not accurate. I mean that is as far as I can say at the moment, because I don't remember the date.

Q. But it would be approximately, it would be on a date within that period of time you think?

A. I think so.

Q. And during the period of time, from March 1933, until he had ceased to be president of the company, you acted in your capacity as his assistant, in carrying out certain policy matters with respect to methods of sale of lead pigments?

A. That is right.

Q. Prior to March 1933, what position did you
1143 hold with the National Lead Company, if any?

A. Well, for some period, I was assistant manager of the Atlantic branch.

Q. Immediately preceding March 1933?

A. Yes.

Q. For what period of time?

A. I would say for somewhere between two and five years; I don't remember.

Q. Then are we correct in our understanding of your testimony that you became the manager of the Atlantic branch of the National Lead Company on some date between 1928 and 1931.

Mr. Ewing: You mean assistant manager.

The Witness: No, you are not correct, because I didn't say that I was manager of the Atlantic branch.

By Mr. MacIntyre:

Q. Assistant manager, I mean.

A. Some date between——

Q. (Interposing) 1928 and 1931?

A. Somewhere approximately then; but I don't remember the date. I would be glad to find it out and let you know exactly.

Q. Were you connected with the National Lead Company in any capacity prior to your becoming Assistant Manager of the Atlantic Branch?

A. Yes.

1144 Q. In what capacity?

A. You mean immediately before that?

Q. Immediately preceding your becoming assistant manager of the Atlantic Branch?

A. I was, I think, assistant sales manager in the Atlantic Branch for a time.

Q. Over what period of time did you serve in that capacity?

A. I would guess about three or four years; I have forgotten.

Q. Would you say that your service in that capacity carried back to as far as 1928?

A. Yes.

Q. Approximately the same date as the organization of the Lead Industries Association, is that correct?

A. If it was organized then; I don't remember when it was organized.

Q. Prior to 1928, that is the date on which you became assistant sales manager of the Atlantic Branch—were you connected in any capacity with the National Lead Company?

A. Yes, perhaps I should make an addition there, that there were other assistant managers of the Atlantic Branch. I was one of them. Prior to 1928, I was a salesman for the Atlantic Branch.

Q. And for what period of time?

A. Oh, from 1920, I guess—well, late in 1919.

Q. During the period of time that you served as
1145 salesman of the Atlantic Branch, and later as one of the assistant sales managers of that branch, and then later as assistant manager of that branch, and then in the higher capacities in which you have served since, through all of that period of time you have been made acquainted with the sales policies of your company, have you?

A. Yes.

Q. And with respect to the terms and conditions of sale employed by your company in its sale of lead pigments?

A. Yes.

Q. Mr. Rowe, in evidence there is a document marked for identification as Commissioner's Exhibit 659-A thru C, inclusive, which is identified as a statement of your company of its terms and conditions of sale on pigments to various classes of customers, effective as of April 26, 1941; do you recall that document?

A. You mean all four pages, or three pages?

Q. Yes.

A. Yes.

Q. Does that set forth the terms and conditions and methods of sale by your company of lead pigments, as announced by your company of that date?

Mr. Ewing: If your Honor please, I object to the characterization included in the question.

Mr. MacIntyre: May we have the question read?

1146 Trial Examiner Norwood: Read the question, please.

(Question read.)

Mr. Ewing: There has been no proof that this exhibit has been "announced" by anybody. That is the basis of my objection.

Trial Examiner Norwood: I think the question takes in a little too much territory. Can the counsel—

Mr. MacIntyre: I would amend the question by striking out the word "announce" if that is the basis of the objection.

Trial Examiner Norwood: Will the reporter read the question as amended?

(The reporter read the question as follows:

"Q. Does that set forth the terms and conditions and methods of sale by your company of lead pigments as of that date"?)

Trial Examiner Norwood: Answer the question, as amended.

The Witness: I don't think there is anything here about methods. Terms and conditions—

By Mr. MacIntyre:

Q. (Interposing.) Under which you quote prices on lead pigments, is that correct?

A. Yes, that is correct.

Q. It does carry a statement of those?

1147 A. That's right.

Q. And for what period of time, Mr. Rowe, did the terms and conditions expressed therein to the effect that in some territories your price-quotations on pigments were higher than in other territory?

A. I don't understand the question.

Q. Well, for what period of time, prior to this date that is shown on the document, has your company used the practice of quoting differentials on lead pigments in some territories over those quoted in other territories, as is shown by that document?

A. You mean on this basis?

Q. Yes, or during what period has the company quoted differentials in some territories, in the territories that are described thereon?

A. I would have to check it; but for a number of years—

Q. (Interposing.) In other words, you followed practice that is outlined there for a number of years, in quoting—

A. (Interposing.) In connection with quoting—

1148 Q. (Interposing.) Differentials in some territories higher than those you quoted in others.

Mr. Ewing: You don't mean the specific differentials, though, here involved?

The Witness: That is what is not clear to me.

Mr. MacIntyre: Let the witness answer the best he can.

Mr. Ewing: The reason I asked that is because I don't understand the question.

Trial Examiner Norwood: He means differentials and not the prices that are different. These same prices here.

Mr. MacIntyre: (Interposing.) Let me withdraw the question, and I will start over again.

By Mr. MacIntyre:

Q. I refer you, Mr. Rowe, to Commission's Exhibit 615-C, and calling your attention to the statement near the bottom of that page, concerning dry white lead, to the effect that in barrels, card prices here 100 lbs., with 1 per cent cash discount deducted, dropping any fraction of a cent, is to the effect that it is to apply in par territory, with 25-cent per 100 lbs. over par territory in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

How long have your company quoted that differential 1149 for those territories, on that product?

A. I would say for about 10 or 12 years—I mean, I don't know the exact time.

Q. For as long as 12 years you have followed that method of quoting a differential?

A. I would say 10 or 12 years; I am not sure of the exact date.

Q. I call your attention to a statement appearing on Commission's Exhibit 615-D, near the top of that page, under the heading "Dry Red Lead and Litharge" to the effect that your company quotes specified differentials in certain territories over the prices that are quoted in par territory.

Will you examine those differentials and tell us how long your company has used those differentials and that method of quoting on those products for the territories specified?

A. I am not sure of the exact figures; but the differentials, generally speaking, have been in effect for about the same time as the dry white lead.

Q. About 10 or 12 years?

A. Yes.

Q. Would you say the differentials for geographical territories, such as outlined in these last two instances that I

have called to your attention, wherever they now appear, in use by your company on lead pigments, have been
1150 used by your company for the same period of time, that is, ten or 12 years?

A. I don't get the question.

Q. That is, wherever your company is now quoting a differential in one geographical territory over the prices quoted in another, on any lead pigments, that it is a practice that has been followed by your company for 10 or 12 years?

A. You mean any single point?

Q. No, the practice of quoting differentials in certain territories over the quotations in par territory, such as is shown by the two exhibits that I called your attention to?

A. Well, have I answered your question regarding dry white lead and red lead and litharge?

Q. Yes.

A. And then you want to know if there is any other—

Q. (Interposing.) I am asking you if the practice has been any different with respect to the method—that is, in its application—as to other lead pigments?

A. I am not sure I understand your question. You mean, what other pigments do you have in mind? Maybe that would clear it up.

Q. Well, I will withdraw that question and start again. I am asking now, Mr. Rowe, that as to any lead pigment that your company sells, and with respect to which it has quoted in territories other than a par territory a dif-
1151 ferential higher than the quotations for par territories, has the practice prevailed for ten or twelve years, as it has, according to your testimony, with respect to red lead and white lead and litharge included in there?

A. Yes, I think it is. I don't know any lead pigments other than red lead and litharge and white lead.

Q. Well, there was a time, more than twelve years ago, when your company quoted prices differently, is that correct?

A. From this?

Q. Yes.

A. Yes.

Q. And that was more than 12 years ago?

A. That is correct.

Q. Would you say that the method, the different method that was used, was referred to be officials of your company,

including yourself, as "quoting on freight differentials to specified points"?

A. When?

Q. Prior to the use of the specified differentials in geographical territories over the par territory?

A. No.

Q. What did you use at the time, in referring to your practice more than 12 years ago, if you did not use the freight differential method?

Mr. Ewing: If your Honor please, I object on the
1152 ground that it is irrelevant and immaterial as to what they called the method.

Trial Examiner Norwood: I think that is part of the explanation here, when he gets a ound to the meat of it. The objection is overruled.

The witness will answer the question.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. What did you use at the time, in referring to your practice more than 12 years ago, if you did not use the freight differential method?")

The Witness: Why they were called differential points; and there were, I don't know how many there were, but there were hundreds of them, I think.

By Mr. MacIntyre:

Q. And the prices quoted as applying at such differential points were destination quotations, is that correct?

A. At the differential points?

Q. Yes.

A. I think it was. I was not in that end of the business at the time, because we had no differential points in the Atlantic Branch. Oh, yes, I guess they had in some products, but I wasn't connected with that end of the business, so I am not really well enough informed to answer you on that.

1153 Q. Did that apply to all pigments, lead pigments sold by your company, that is, that method of quoting differentials?

A. I can't answer the question. You mean you are speaking of prior to 1933, is that right?

Q. Yes.

A. I don't know. It may or may not.

Q. Well, are we correct in our understanding from your testimony that about 12 years ago your company did change from the use of that method to the method that it presently uses in making its quotations?

A. That's correct.

Q. And that present method as shown by Commission's Exhibit 659, your price announcements show quotations by territorial zones, including par zones, and then each of a number of other territorial zones; do you recall those cards?

A. Well, I don't know the number of the exhibit. What was that exhibit you referred to? Was that the one that you just showed me?

Q. No. These are the price cards on Dutch White Lead and other lead pigments?

A. Yes.

Q. You are acquainted with those cards, aren't you?

A. Yes.

Q. And you do know there is a set of them that applied to par zones, a territorial Northeastern zone, is that correct?

1154 A. Yes.

Q. And you know that certain others apply to other territorial zones, is that correct?

A. Yes.

Q. Now, how long has it been that your company has been using cards applying to such territorial zones, as distinguished from quotations on differential points?

A. Somewhere around 10 or 12 years; I don't know the exact date.

Q. Is it your testimony that you do not know the exact period of time when your company made the change from the differential point method of quoting to the zone method of quoting that it is now using?

A. The exact date, did you say?

Q. Within 12 months of the date? When the announcement was first made of the change?

A. I would say it was somewhere between December or November of 1933, and June of 1934.

Q. Do you recall discussing those matters with Mr. H. M. Carter, of your company, do you?

A. Yes, sir.

Q. I now show you a document marked for identification in this case as Commission's Exhibit 575, and I will ask you to state what that is.

Mr. Ewing: Your Honor, I wonder if we might
1155 have a recess?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

1156 Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. What it your answer with respect to exhibit 595, Mr. Rowe?

A. I have forgotten the question.

Q. I asked you to state what that document is.

A. It is under the heading of the National Lead Company dated December 8, 1933 to all branch managers, office of vice-president in the corner, and signed by the president.

Trial Examiner Norwood: What is it? A bulletin or a sheet of instructions or what?

The Witness: It is a long letter which I do not recall. I may have seen it, but I may not. I don't recall it—in regard to adopting a system of agency selling to the branch managers.

By Mr. MacIntyre:

Q. Does that refresh your memory and recollection as to the date on which your company began to make a change in its method of quoting and changing its conditions of sale on white lead?

A. Well, the original change was made a year before that. You asked me about differential zones in the west?

Q. Yes.

A. But the agency method of selling was introduced, I think, in January of 1933.

1157 Q. Just a few months ahead of this bulletin?

A. Nine months.

Q. And was it discontinued after that?

A. Was the agency—

Q. (Interposing.) Was it temporarily discontinued after it was first put into use in January 1933?

A. Not that I recall.

Q. I show you a document marked for identification as Commission's exhibit 597, and I ask you to state what that is (showing to witness)?

A. What?

Mr. MacIntyre: Read the question.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. I show you a document marked for identification as Commission's exhibit 597 and I ask you to state what that is?")

The Witness: It is a mimeographed copy of a letter from Mr. McNair who is the assistant manager of the Atlantic branch quoting a telegram which he had sent, I assume, to our branches. It doesn't say and I have no business to imagine anything, I guess.

By Mr. MacIntyre:

Q. Well, I call your attention to Commission's ex-
1158 hibit for identification 598 and I ask you to state if that is a copy of the telegram that is referred to in exhibit 597?

A. Yes.

Q. And which was sent to the branch managers whose names appear thereon at those locations?

A. Yes.

Q. And what can you say as to Commission's exhibit for identification 599?

A. That is a telegram—a copy of a telegram to Mr. Maston.

Q. From your superior, Mr. Carter?

A. That's right.

Q. On October 26, 1933?

A. That's right.

Q. Now do these documents, exhibits 597, 598 and 599 refresh your memory and recollection as to the time and manner in which your company made changes in its practice of selling white lead?

A. Yes. I think I said—what did I say?—December or something like that.

Mr. Dixon: January.

The Witness: Well, that apparently went in before January, but I would have to check further. These documents don't prove to me that it went in at this time.

By Mr. MacIntyre:

1159 Q. But they refresh your memory and recollection as to the practices of your company in making its changes in terms and conditions of sale?

A. I don't quite get the question.

Q. Well, I will withdraw the question. I now show you a document marked for identification as Commission's exhibit 596-A and B, and I ask you to state what it is (showing to witness).

A. That is a letter to our branches which I sent to them under date of October 21, 1933.

Q. I show you a document marked for identification as Commission's exhibit 601-A and B, and I ask you to state whether that is a multigraph of a letter from you to all branch managers under date of November 9, 1933 (showing to witness)?

A. What is the question?

Mr. MacIntyre: Read the question.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. I show you a document marked for identification as Commission's exhibit 601-A and B, and I ask you to state whether that is a multigraph of a letter from you to all branch managers under date of November 9, 1933?")

The Witness: That's correct.

1160 By Mr. MacIntyre:

Q. I mean by that branch managers of the National Lead Company.

A. Right.

Q. I now show you a document marked for identification as Commission's exhibit 603 and I ask you to state what that is (showing to witness).

A. That is a similar letter which I sent to all of the National Lead Company branch managers on November 21, 1933.

Q. That is the branch managers of the National Lead Company?

A. That's right.

Q. I now show you documents marked for identification as Commission's exhibits 609 and 610, and I ask you to state what they are (showing to witness)?

A. They are cards sent out by the Atlantic branch of the National Lead Company headed "Quantity discounts" showing discounts for in one case 500 pound lots and 1,000 pound lots, and in the other case the same and 10,000 pounds and carload lots. No dates on either.

Q. I will ask you if you will please make reference to Commission's exhibit for identification 603 and after so

doing tell us whether or not you can testify concerning the dates on which Commission's exhibits for identification 609 and 610 were published and distributed by your company?

A. The dates that these cards were sent out; is 1161 that the question?

Q. Commission's exhibit for identification 609 and 610—

A. (Interposing.) You want to know if I can say approximately what dates they were sent out?

Q. Yes.

A. I can't say that; I am sorry. But I don't know. I don't think that they refer or are connected with this letter. I think they were sent out prior to that time.

Q. Would you say that they were sent out prior to the summer of 1933?

A. They may have been.

Q. Well, would you say that they were sent out subsequent to the date of the letter, Commission's exhibit for identification 603, dated November 21, 1933?

A. No, I don't think they were.

Q. In other words, you think they went out prior to the date of that letter?

A. Yes.

Q. Well, would you say that they were issued and distributed by your company within a period of 12 months from the date of your letter? That is, November 21, 1933?

A. Prior to it, you mean?

Q. Yes. Within a period of 12 months prior thereto?

A. I would say they may have been within a period of 12 months or they may have been more than 12 months 1162 before the letter.

Q. Mr. Rowe, I now show you documents which are in evidence in this case as Commission's exhibits 581-A through 581-E, and I ask you to state what they are (showing to witness).

A. They are letters from our San Francisco office, Pacific Coast branch, specimen letters, they say, here under date of January 26?

Q. January 26 of what year?

A. I beg your pardon, of 1937, referring to a price change which became effective at that time and which was sent, I imagine to their branch divisions.

Q. That is, to the branch divisions of the National Lead Company?

A. Of the Pacific Coast branch, not of the National Lead Company.

Q. Well, would you say then that they represent claims and conditions of sale that were then being made effective by the Pacific Coast branch of your company as of that time?

A. Yes.

Q. To whom were those papers sent in your organization? To branch managers or agents?

A. Well, I can't say to whom these were sent other than by judging from their appearance where they would be sent and that would be to our division manager of the Pacific Coast branch at Los Angeles, Seattle and Port-
1163 land. There must have been papers with it.

Mr. MacIntyre: If your Honor please, I now offer into the record documents which have heretofore been marked for identification as Commission's exhibits 595, 596-A, and B, 597, 598, 599, 601-A and B, 603, 609, and 610 as identified by Mr. Rowe here today as papers of his company.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: They will be received in evidence and marked.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 595, 596-A, 596-B, 597, 598, 599, 601-A, 601-B, 603, 609, 610, were received in evidence.)

Mr. MacIntyre: May I go off the record?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. Mr. Rowe, do you know of any one official of the National Lead Company associated with you in its general offices and who has been with the organization as long as you have presently available and who would be able to give us more precisely details concerning dates of changes in practices than you have been able to give us?

1164 A. Not without consulting the record. I mean I could give you more definite information if you give me time to get it, but I can't remember it.

Q. Well, would there be anybody else in your organization that would be more able to do it than you?

A. I don't believe so.

Q. I believe you told us that Mr. F. M. Carter left the company in 1938 or thereabout?

A. I think I said 1940, but I am not sure. It was somewhere in that time.

Q. Is he alive today?

A. I can make that more definite. It was prior to the Fall of 1939 that he left. He is alive, yes.

Q. But no longer associated with your company?

A. That's right.

Q. Is Mr. Cornish alive?

A. No.

Q. When did he die?

A. I think he died about 1938. I don't know the date, but I can get that accurately if you want it.

Q. Are you acquainted with a Mr. Albert Chatfield of Cincinnati, Ohio?

A. Not that I recall.

Q. Do you have any reason to believe that you would not recall him if you did know a broker in Cincinnati 1165 by that name?

A. I don't understand the question. Would I have any reason to believe that I would not recall him?

Q. Would you recall a stock broker with whom you had any dealings?

A. I certainly would recall him.

Q. Do you know of the existence of any records of the United Lead Company at the offices of the National Lead Company?

A. No, I don't.

Q. Have you known of the existence of any such records during the course of your association with the National Lead Company? That is, from the period of the last 25 years.

A. I don't recall any record of theirs that I have ever seen or known of.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Is there any cross examination?

Mr. Ewing: Yes.

Cross-Examination by Mr. Ewing.

Q. Mr. Rowe, do you recall being asked by Mr. MacIntyre certain questions with respect to the documents which have been marked Commission's Exhibit 581-A to E for identification?

Mr. Ewing: Are they received in evidence?

1166 Mr. MacIntyre: They are in evidence.

By Mr. Ewing:

Q. I think you said that you supposed from the information appearing on them and contained in them that they had been probably sent to the division managers of National Lead's Pacific branch?

Mr. MacIntyre: I object. That does not state the condition of the record. In fact, it erroneously states what the record shows.

Mr. Ewing: I am perfectly willing to go back to the record.

Trial Examiner Norwood: Counsel's statement was, "I believe you said that." If he did not say, he can tell us so.

Mr. Ewing: There was testimony with respect to what disposition was made of them, and that was my recollection.

Trial Examiner Norwood: I think the matter is clear now.

Mr. MacIntyre: I object to the question and ask that the witness be asked to state now what his testimony was instead of counsel telling him what he thought it was.

Trial Examiner Norwood: He is cross examining him, but I might as well state here that the regular rule to leading questions on cross examination under the circumstances is not followed by us.

1167 Mr. Ewing: I understand that.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I would want to know what the question was that was asked of me originally before I say what answer I will make to it. I don't want to say that I will answer a different question in the same way as I answered that one.

Mr. Ewing: I might make myself clear. What I am about to attempt to do is to simply clear up one situation for the purpose of making the record clear on the point. My recollection—and what I am interested in—was that

I understood the witness to have testified that this exhibit that I referred to was not of his own knowledge or that he knew but that he assumed that it had been sent to the division branches of the Pacific Coast branch.

Mr. MacIntyre: Now, if your Honor please, I object to statements of that kind by counsel to his client which—and I respectfully refer all of you to the record—erroneously misstates the record and does state what counsel wished that the record did show.

Mr. Ewing: It does not do anything of the kind.

Trial Examiner Norwood: I don't follow that. I will overrule the objection and ask the witness to answer the question.

Mr. Ewing: I would prefer if it would be appro-
1168 priate if the reporter could find that portion coming at the close of the direct where the question was asked so that we would all know exactly what the facts are.

Trial Examiner Norwood: Let the witness tell us what he did say on the subject. What do you recall was said on the subject?

The Witness: As I recall, I said that the letters apparently were sent by our Pacific Coast branch under date of January 26. There is a note in the corner that indicates that they were sent to our division managers, Pacific Coast branch division managers, but that I couldn't say whether they were or not because I didn't know.

By Mr. Ewing:

Q. Would it affect your answer in any way if I called your attention to the fact that the record in this case on page 298, 299, in the course of Mr. MacIntyre's examination—

Mr. MacIntyre: (Interposing.) If your Honor please, I object to the counsel telling the witness what the record shows.

Trial Examiner Norwood: Wait a minute.

Mr. Ewing: I have to ask the question with reference to the record which bears directly on it.

Mr. MacIntyre: That is leading.

Trial Examiner Norwood: I am not certain that counsel should bring this out in that way. You are cross
1169 examining him but, after all, he is your client and I think you may bring out the facts there without reading the record.

Mr. Ewing: Well, I have to summarize the record to make my point.

Trial Examiner Norwood: What is that? If you want to talk about the record, I will ask the witness to go out of the room.

Mr. Ewing: I will come up to you and say exactly what it is so there won't be any question about it.

Trial Examiner Norwood: All right. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. On your direct examination when you answered with respect to what you assumed had been the disposition of those documents, did you know that the exhibits which you were shown according to the testimony in this case of Mr. Dunn had been procured from the files of Eagle Picher?

Mr. MacIntyre: I object to the witness' testimony on direct is not as it is now characterized.

Mr. Ewing: I did not characterize it at all. I asked him did he know when he testified on direct—

Mr. MacIntyre: (Interposing.) That he assumed something. He did not assume something, but he stated facts.

1170 Trial Examiner Norwood: I am going to ask you to please be quiet until he finishes his question. Read the question.

(Whereupon, the reporter read the question as follows: "Q. On your direct examination when you answered with respect to what you assumed had been the disposition of those documents, did you know that the exhibit which you were shown according to the testimony in this case of Mr. Dunn had been procured from the files of Eagle Picher?")

Trial Examiner Norwood: Objection overruled. You may answer that question.

The Witness: No.

By Mr. Ewing:

Q. Would that fact in any way change your testimony to the effect as I recall it that other copies of those documents were sent to the division branches of the Pacific Coast branch of National?

A. I don't recall testifying that they had been sent. I didn't say that they had been sent as I recall it.

I said I assumed from the notation on the corner of the letter that that was the purpose of it.

Q. Would the knowledge of this other fact change that assumption in any way?

1171 A. Yes, it would.

Q. In what way?

Mr. Wright: Your Honor, I object. I don't see the purpose of the question. How can the fact that if he had known that this was found in the Eagle Picher files make any difference in the witness' answer as to what the document is and use to which it was put.

Trial Examiner Norwood: We are going to have that all brought out and you will get a chance to ask questions on it. I want this thing straightened out. The objection is overruled.

The Witness: Well, I wouldn't know how such a letter would get into the Eagle Picher files.

By Mr. Ewing:

Q. Well, it is a fact, isn't it, Mr. Rowe, that you yourself have no personal knowledge as to what was done with the originals of which these documents are copies of?

Mr. MacIntyre: I object; it is leading the witness.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I have no knowledge whatever of this letter or anything attached to it prior to sitting in the witness stand here today.

Mr. Ewing: I have no further cross-examination.

Trial Examiner Norwood: Is there any further
1172 examination?

Mr. MacIntyre: May we go off the record for a minute, your Honor?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Redirect Examination by Mr. MacIntyre.

Q. Mr. Rowe, will you please state for the record just what about the fact that that document was found in the files of the Eagle Picher Lead Company would cause you to change any testimony that you gave on direct examination?

A. May I have that testimony reread? We have discussed it so many times here that I don't follow it.

Trial Examiner Norwood: I think you can answer that. He just made a statement there as to your changing your testimony. I think you can tell us the basis of the last testimony you gave without having the record read.

The Witness: If this correspondence came from the Eagle Picher Company's file, then my answer that I gave before is not correct.

By Mr. MacIntyre:

Q. You mean the answer that you gave on direct examination in response to my question?

A. Yes.

1173 Q. Why isn't it correct if this is found in the files of the Eagle Picher Lead Company?

A. That isn't the question. The question was if I knew that this was in the file of the Eagle Picher Lead Company, I wouldn't have answered as I did.

Trial Examiner Norwood: You have made the assumption that counsel understood you made that you knew the papers were sent out to the district office?

The Witness: That's right.

Trial Examiner Norwood: Now he is asking you to explain why your knowledge that these papers came from Eagle Picher's file would cause you to change that assumption as to the original purpose of those papers. Can you tell us that? That is, why that fact would cause you to change your assumption?

The Witness: Well, it wouldn't have been in the Eagle Picher's file if that had been what they were for.

By Mr. MacIntyre:

Q. Why couldn't they have?

A. Well, they wouldn't have gone to our branches, and they may have gotten it from somewhere, but I don't know where.

Trial Examiner Norwood: Well—

The Witness: (Interposing.) I haven't any idea where it came from.

By Mr. MacIntyre:

1174 Q. Is it your testimony that it would have been impossible for the Eagle Picher Lead Company to have secured this from your branches?

A. I wouldn't be able to say one way or the other.

Q. Well then, in the light of that answer, why is it that you feel that the fact that it is found in the Eagle Picher Lead Company's files necessarily leads you to change the testimony you gave on direct to the effect that your branch managers of the Pacific Coast branch sent it to their district offices?

A. I didn't say they sent it to their district offices. I said I assumed that that was the purpose.

Q. Why is it necessary for you to now change the testimony that you did give in that respect by virtue of the mere fact that this document was found in the files of the Eagle Picher Company?

A. I wouldn't assume that it was made up to be sent to our branch managers if it is in the Eagle Picher Company's file.

Q. Why wouldn't it have been made up then?

A. I wouldn't have any idea.

Q. Who in your company would know if you do not know?

A. I don't know who would know.

Q. Who was responsible in your company as of that date for the making up of such papers as a matter of policy?

A. The manager of the Pacific Coast branch.

1175 Q. And who is his superior as of that date?

A. He had no superior on this.

Q. Well, as of 1937 were not you his superior?

A. Not in matters of this sort. The Pacific Coast branch worked quite independently of New York and their method of pricing was entirely different from the rest of the country.

Q. But they were nevertheless subject to your direction at that time, weren't they?

A. Not on matters of this sort.

Q. But I mean in general as to matters of policy?

A. Very general matters of policy.

Q. They are certainly under the control of the National Lead offices in New York, aren't they?

A. They are, yes.

Q. Do you know to whom they send all papers that they mail?

A. No, I don't know.

Q. Is it a fact that at times you prepare papers in the

New York office which you send to them for them to use in connection with instructing salesmen in that branch?

A. No.

Q. Is it your testimony that you have never done that?

A. Instructing salesmen?

Q. No, Mr. Rowe.

A. I beg your pardon, that is what you said.

Q. No. My question is this: Is it your testimony
1176 that you have never prepared papers in the New York office of the National Lead Company to be used by the Pacific branch of that company in instructing its salesmen?

A. Instructing its salesmen in what way, I mean?

Q. In any way as to carrying out matters of policy of your company.

A. We have instructed them at the time of a price change that we are changing the price.

Q. Is it your testimony that you have never instructed them concerning changes of methods of doing business?

A. Are you referring to what is contained here? That is, Dutch Boy White Lead and White Lead Dry, red lead dry, litharge to dealers and so forth?

Q. I am not referring to any document. Will you please answer the pending question?

A. What is the question?

Trial Examiner Norwood: His question is a general question and would include the matters that you mentioned there and others.

The Witness: Would you repeat it please?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. Is it your testimony that you have never instructed them concerning changes of methods of doing busi-
1177 ness?")

The Witness: I don't recall, but I wouldn't want to answer that question yes or no that I never have. Methods of doing business is very broad. I mean on things of this sort the answer would be no.

By Mr. MacIntyre:

Q. In other words, it is your testimony that the Pacific branch of the National Lead Company is absolutely free of your control and the directions of the general officers of the National Lead Company in putting into effect methods of doing business?

A. I didn't say that.

Q. That is methods such as are represented by Commission's Exhibit 581 then? You would have no control over them in putting into effect such practices as those?

A. I didn't say we would have no control over them.

Q. Just what is the fact, Mr. Rowe? Do you have any control over them with respect to the inauguration of any such method as that or not?

A. We have control, but we leave matters of this sort up to them. They know their conditions on the West Coast far better than we do or ever will and their methods of doing business—they are different from what they are in the East in these items that are under discussion and have been for many years.

1178 Q. Is it your testimony that the Board of Directors of which you are a member of the National Lead Company does not act in ordering price changes not only for the Atlantic branch but also of the Pacific branch of the National Lead Company?

Mr. Ewing: I object to that, your Honor. I think he is going awfully afar afield from the limited point that I went.

Trial Examiner Norwood: I think he may inquire into that. Objection overruled. Read the question.

(Whereupon, the reporter read the question as follows: "Q. Is it your testimony that the Board of Directors of which you are a member of the National Lead Company does not act in ordering price changes not only for the Atlantic Branch but also of the Pacific branch of the National Lead Company?")

The Witness: The Board of Directors doesn't act on changes of prices.

By Mr. MacIntyre:

Q. Is it your testimony that it has not done so?

A. Well, I wouldn't know. It hasn't in recent years on the matter we are discussing.

Q. You are a member of the Board of Directors, I believe you testified?

A. That's correct.

1179 Q. And it is your testimony that it does not act in ordering price changes by your company?

A. It has not done so for several years in the matter under discussion.

Q. Well, I am asking about price changes. That is the matter under discussion in the question, and do you limit your answer to that question as thus limited?

A. I don't think I understand that question.

Q. I will restate it. Is it your testimony that the Board of Directors of the National Lead Company of which you are a member has not acted in ordering price changes to be put into effect by your company?

A. At any time?

Q. Well, will you answer the question?

A. Well, I would have to know.

Q. Since you have been a member of it?

A. No, I can't recall any time that the Board of Directors has acted on a price change.

Q. Do you think that you would have remembered if such action had been taken with you being a member of the Board of Directors at the time?

A. I think I would, but I don't remember it.

Q. Do you think that you would remember any action of that kind any clearer than circumstances would permit you to know about the distribution of the document
1180 marked for identification as Commission's exhibit 581?

A. I don't quite get that question, I am sorry.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. Do you think that you would remember any action of that kind any clearer than circumstances would permit you to know about the distribution of the document marked for identification as Commission's exhibit 581?")

The Witness: Yes, if I understand the question correctly. I would remember the Board of Directors acting on a price change at a meeting which I presumably would have attended better than I would remember documents mailed by our Pacific Coast branch.

By Mr. MacIntyre:

Q. And yet, even in the light of such fact, you have no recollection of the Board of Directors taking any action with respect to price changes since you have been a member of it?

A. No.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Is there any further examination?

Mr. Ewing: No further examination.

1181 Trial Examiner Norwood: Thank you, Mr. Rowe. You are excused.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. With respect to the ruling which I took under advisement yesterday as regards Commission's exhibits for identification 92 consisting of 142 numbered pages being a bound pamphlet and Commission's exhibit 93-A to I inclusive, and Commission's exhibit 94-A to G inclusive, Commission's exhibit 22-A to Z-47 inclusive, I shall overrule the objection and receive all this material in evidence. Full explanations of all these matters are in the possession of the respondents.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 92, 93-A, 93-B, 93-C, 93-D, 93-E, 93-F, 93-G, 93-H, 93-I, 94-A, 94-B, 94-C, 94-D, 94-E, 94-F, 94-G, 22-A, 22-B, 22-C, 22-D, 22-E, 22-F, 22-G, 22-H, 22-I, 22-J, 22-K, 22-L, 22-M, 22-N, 22-O, 22-P, 22-Q, 22-R, 22-S, 22-T, 22-U, 22-V, 22-W, 22-X, 22-Y, 22-Z, 22-Z-1, 22-Z-2, 22-Z-3, 22-Z-4, 22-Z-5, 22-Z-6, 22-Z-7, 22-Z-8, 22-Z-9, 22-Z-10, 22-Z-11, 22-Z-12, 22-Z-13, 22-Z-14, 22-Z-15, 22-Z-16, 22-Z-17, 22-Z-18, 22-Z-19, 22-Z-20, 22-Z-21, 22-Z-22, 22-Z-23,
22-Z-24, 22-Z-25, 22-Z-26, 22-Z-27, 22-Z-28, 22-Z-29,
1182 22-Z-30, 22-Z-31, 22-Z-32, 22-Z-33, 22-Z-34, 22-Z-35,
22-Z-36, 22-Z-37, 22-Z-38, 22-Z-39, 22-Z-40, 22-Z-41, 22-Z-42, 22-Z-43, 22-Z-44, 22-Z-45, 22-Z-46, 22-Z-47, were received in evidence.)

Mr. Ewing: On behalf of the respondents, I should like to state, if your Honor please, that they would like to appeal to the Commission from the ruling on the reception of these particular exhibits and we would proceed to prepare the appeal and apply for a hearing at as early a date as we can.

Trial Examiner Norwood: Well, I will advise counsel that I understand we are going to have a recess after tomorrow, and then we will be free for a couple of weeks, and I will be glad for them to go down there. I might say that the new rule of practice would prevent an old fashioned interlocutory appeal and I will state for the record to counsel that I will certify this question to the Commission so that it may be heard. I want to notify counsel that it must be filed directly with the secretary of the Commission and copies sent to the Commission's attorney, and I should be glad to have a copy.

Mr. Ewing: We will furnish that.

Trial Examiner Norwood: Is there anything further?

Mr. MacIntyre: We have no further witnesses this afternoon, if your Honor please, but we expect to
1183 have a witness tomorrow morning. We do not expect that the hearings will require sessions all day tomorrow but only for part of the morning.

Mr. Ewing: May I go off the record?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. At the request of counsel, the hearing is now adjourned until 9 o'clock tomorrow morning, Eastern Standard Time at the same place.

(Whereupon, at 4:20 p.m., June 26, 1946, the hearing in the above entitled matter was adjourned.)

1184 Room 605, Bar Association Bldg.,
New York City, New York,
June 27, 1946.

Met pursuant to adjournment, at 9:00 a.m., E.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.)

T. J. McDowell, Esq., (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and

Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

1185 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.) appearing for the National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.) appearing for The Glidden Company.

1186 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday the hearing in the docket number 5253 in the matter of the National Lead

Company and others, is now convened in the trial room of the Bar Association Building at 36 West 44th Street, New York, N. Y. at 9 o'clock a.m., Eastern Standard Time on the 27th day of June 1946.

Let the record show the following appearances:

Everette MacIntyre, Esq., Joseph S. Wright, Esq., and Paul R. Dixon, appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.) appearing for the National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York) 1187 appearing for the Glidden Company.

Trial Examiner Norwood: Will you proceed, Mr. MacIntyre.

Mr. MacIntyre: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. MacIntyre: If your Honor please, I have just requested counsel for each of the respondents to submit to us for your further inspection each of the invoices listed in the tabulations which we have heretofore offered in evidence and it appears that they are inclined to comply with that request and I would like to ask them, therefore, on the record to state their reaction to it.

Mr. Gardiner: If your Honor please, on behalf of the respondent, International, I wish to state that we will cooperate to the fullest extent in supplying the requested evidence.

The only limitation on our ability to start on that right now is the fact that we are not at the moment in possession of copies of all of the invoices from which the Commission took this information.

On receipt of that, we will proceed to segregate these invoices and send them to the Commission at the earliest possible moment.

1188 Mr. MacIntyre: The 10-day period that I mentioned in that respect off the record, of course, I wouldn't consider as complying that it is the date until we get the photostatic sheets into the hands of Mr. Gardiner.

Mr. Wood: Mr. MacIntyre said that he thought that we were inclined to reply with the request and I do not think that my client, that Eagle-Picher would be inclined to comply with the request at all, but I think they will do it.

Mr. MacIntyre: You will undertake to cooperate with us on that?

Mr. Wood: I shall.

Mr. MacIntyre: Mr. Welch.

Mr. Welch: We will comply unless I notify Mr. MacIntyre to the contrary within the next 2 or 3 days in which event he, of course, will have his own oppositions for any further action to take.

I believe our people will comply but I am not making any guarantee that they will. But I will notify you within the next 2 or 3 days if they won't.

And if they will I will guarantee that it will be done as fast as possible but I am not guaranteeing that it will be done within any 10-day period.

Mr. DuBose: The respondent, National, will comply with the request as soon as practical.

Mr. MacIntyre: May we go off the record?

1189 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed. Call your next witness, Mr. MacIntyre.

Mr. MacIntyre: I recall Mr. Robert T. Dunn.

ROBERT T. DUNN was recalled by the Commission and having previously been sworn testified further as follows:

Further Direct Examination by Mr. Wright.

Q. Mr. Dunn, you have previously been sworn in this matter, have you not?

A. I have.

Q. As I recall your testimony, Mr. Dunn, you stated

that you had made an investigation in this matter in the office of the Lead Industry's Association and discussed the affairs of that Association with Mr. Werner's secretary?

A. I did.

Q. Were you in the hearing on the afternoon of June 25, 1946 during the testimony of Mr. Wormser?

A. I was.

Q. Do you recall a statement by Mr. Wormser regarding documents which were received in evidence marked as Commission's exhibit 519-A and B consisting of a letter from Mr. W. E. Maston of the Eagle-Picher Lead 1190 Company to Mr. Wormser under date of January 31, 1934 and a reply by Mr. Wormser to that letter?

A. Well, before I answer that, I don't associate that exhibit number with it. If you will tell me more what it is about—

Q. (Interposing.) I show you page 1036 of the transcript (showing to witness).

A. You are referring to the letter about the map?

Q. Yes.

A. Yes, I recall now and I heard him testify concerning that letter.

Q. Do you recall whether you received from Mr. Wormser the map which is referred to in that letter from Mr. Maston to Mr. Wormser?

A. I did. I found the letter and a map attached in the files and Mr. Wormser loaned it to me.

Q. Do you recall whether you returned that map to Mr. Wormser at the conclusion of your investigation?

A. I not only recall returning it but Mr. Wormser made a list of all papers, letters, everything that he gave me. The list was returned and the papers listed thereon were returned and Mr. Wormser informed me that the notations on the list in their office showed that everything was intact that I borrowed.

Mr. Wright: I ask that this document be marked 1191 for identification as Commission's exhibit 809.

Trial Examiner Norwood: It will be so marked.

(The paper referred to was marked Commission's Exhibit 809, for identification.)

By Mr. Wright:

Q. Mr. Dunn, do you recognize the document marked as Commission's exhibit 809 (showing to witness)?

A. I do.

Q. Will you please state what it is?

A. It is a pamphlet entitled, "National Recovery Administration, Code of Fair Competition for the Lead Industry." I believe that answers your question. You asked me to state what that is.

Q. Where did you receive that?

A. In the office of the Lead Industry's—discussing matters with Mr. Wormser the question of a code came up and it was mentioned in the course and minutes and Mr. Wormser has a copy and he then told me that he had an extra copy which he would be glad to give me and this is the extra copy which he gave me.

Q. Was this given to you by Mr. Wormser as a copy of the Code of Fair Competition for the Lead Industry?

A. That is right.

Mr. Wright: Your Honor, I offer Commission's exhibit 809 in evidence.

1192 Trial Examiner Norwood: Is there any objection?

Mr. MacIntyre: May we be off the record please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Hinds: I object, your Honor, as to its pertinency to Count 2, I raise the objection that it substantially antedates the enactment of the Robinson-Patman Act as to its pertinency to both Count 2 and Count 1. I object to its being hearsay and in no way constituting a declaration by them in or out of court or anything that is in any way binding upon them.

On its face it purports to be some governmental regulation that was apparently imposed on this industry and in no way affecting Glidden's responsibility in this action.

Trial Examiner Norwood: Counsel's point is well taken as far as any order for a violation of that act being based on something that was done under this code. But I can conceive it being offered and received for other purposes. Will you state your objection, Mr. Wood?

Mr. Wood: I have no objection to it whatsoever. I would like to know though whether for the purposes of this case that the notations appearing on the face of it as approved on May 24, 1934 may be accepted as

1193 proof of that fact.

Mr. MacIntyre: No, we can accept that as a date

on which the proper officials in Washington gave consideration to the code. We will do that.

Trial Examiner Norwood: Well, does the paper say that it was accepted on that day?

Mr. Wood: It has the notation that it was approved on such and such a date.

Trial Examiner Norwood: Is that printed on it?

Mr. Wood: Yes.

Mr. Wright: Your Honor, that is an official document that was printed by the government printing office.

Mr. Wood: It may be accepted at its face value as having been printed on that day.

Trial Examiner Norwood: It is accepted as evidence of that. It may be shown to be an error but until it is shown to be an error, it would stand.

Mr. Wood: The only reason I raise the point is that when the witness was asked to describe it, he replied that it was a pamphlet containing certain printing on its face. That is why I raised the point.

Mr. DuBose: The respondent, National Lead, raises no objection subject to correction of any errors that may appear in the document. I assume that it is a correct copy.

1194 Trial Examiner Norwood: It is offered under Count 2?

Mr. MacIntyre: It is offered for all purposes to which it could apply.

Mr. Wright: It is offered as a copy of the Code of Fair Competition as promulgated for the lead industry as shown on its face and in its contents, your Honor.

We have had some documents already entered and admitted into evidence which show meetings of these respondents with reference to the drafts of a code of fair competition that the record would hardly be complete without having the code itself.

Trial Examiner Norwood: It will be received as marked. I will overrule the objection.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 809, was received in evidence.)

Mr. Wright: I have no further examination of this witness.

Trial Examiner Norwood: Is there any cross-examination?

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

1195 Mr. MacIntyre: If your Honor please, I would like for the record now to show what response Mr. Hinds has to the off the record request that I made of him as well as of other counsel to submit to us for your further inspection the invoices of the Glidden Company which are numbered on the tabulation of the Glidden invoices now in evidence.

Mr. Hinds: Well, I object to having requests for cooperation placed upon the record because then that puts us in the embarrassing position of setting forth what we will or will not do in those connections.

It seems to me that requests of that sort should be made entirely a matter of off the record until the answer has been given and then the result of the stipulation should be put on rather than the negotiation of it.

This is really in the course of negotiating and I don't think we should proceed in that manner. I could make various requests of the government that they do this, that or the other thing and put them in the record in the nature of argumentation and then exploit their refusal to agree on these things.

Trial Examiner Norwood: Counsel may do that.

Mr. Hinds: Specifically I have already stated that I would comply.

Mr. MacIntyre: If your Honor please, I thought our negotiations were completed satisfactorily and may

1196 we go off the record to continue them since it appears now that they are not complete.

Trial Examiner Norwood: Well, I think we have said enough about it. Counsel for the Commission makes a request on the record that these invoices should be produced and all the other respondents have replied to that on the record stating whether they will or will not or stating just what they will do about it, and counsel for Glidden is now asked what his reaction is to that request.

Mr. Hinds: I have already written a letter since the request was made to Cleveland recommending that we cooperate fully in that respect, because I understand that those matters have to be added to the tabulation.

I, of course, don't know what the physical difficulty will

be because these originals I understand came from various branches and they may have been redistributed, which might handicap us, but we will cooperate, I am sure.

Trial Examiner Norwood: Thank you.

Mr. MacIntyre: Thank you, Mr. Hinds. May we have a five minute recess?

Trial Examiner Norwood: We will take a five minute recess.

(Short recess.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: If your Honor please, I would
1197 like to call as the next witness for the Commission, Mr. E. A. Behr.

E. A. BEHR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

Q. What is your full name?

A. E. A. Behr.

Q. Mr. Behr, will you please state the nature of your occupation?

A. Well, I was for many years assistant sales manager of the American Smelting and Refining Company, 120 Broadway.

Q. Are you now so employed?

A. I am not. I retired as of the end of 1945.

Q. You have been in retirement for the last six or seven months?

A. The last six months.

Q. And prior to your retirement you were assistant sales manager of American Smelting and Refining Company at 120 Broadway for what period of time?

A. For 38 years. Not all of that time as assistant sales manager. At first I was assistant sales agent and then assistant sales manager.

Q. And during that period of time, did you han-
1198 dle any transactions between your company, the American Smelting and Refining Company, and the National Lead Company?

A. I did. I made practically all the sales of pig lead.

Q. And did National during that period of time purchase pig lead from the American Smelting and Refining Company?

A. It did.

Q. Will you please state the order of importance in which the National Lead Company came among your customers as customers of pig lead for the production of pigments?

Mr. DuBose: If your Honor please, the respondent, National, objects upon the ground that this is wholly irrelevant, immaterial as well as incompetent to the issues in this case.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I should say they were No. 1, our most important customer in that line.

By Mr. MacIntyre:

Q. Will you explain your answer as to why you regarded them as being important and as so important as to be No. 1?

Mr. DuBose: I object to that as calling for a conclusion of the witness.

Trial Examiner Norwood: Well, now just in the form of the question, it appears so, but I think that his purpose is to elicit some facts as to the sales and volume
1199 of business which they are doing with this company.

I will ask the witness to answer that factually. If they are important, give us some data upon which you base your previous opinion that they were the most important. I will overrule the objection.

The Witness: They were our largest buyers of corroding quality pig lead.

Trial Examiner Norwood: What percentage did they buy of the total sales?

The Witness: I really couldn't tell you. I don't know at the moment.

Mr. MacIntyre: If your Honor please, I now make reference to a document marked for identification as Commission's exhibit 101 and I ask you, Mr. Behr, to state if you can what that is (showing to witness).

The Witness: Exhibit 101 is a letter from Mr. Hall of the National Lead Company in reference to their purchase of pig lead on the Pacific Coast.

By Mr. MacIntyre:

Q. From American Smelting and Refining? That is their purchase from American Smelting and Refining?

A. No. It is about their total purchase out there.

Q. And the date of the letter?

A. January 24, 1931.

Q. And to whom is the letter addressed?

A. It is addressed to me, American Smelting and
1200 Refining Company.

Q. You received the original of that letter?

A. Right.

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 103 and I ask you to state what that is (showing to witness)?

A. Exhibit 103 is a letter from the American Smelting and Refining Company addressed to the National Lead Company in which the smelting company signifies its willingness to deliver metal under a certain contract either to St. Paul or Kansas City.

Q. And that letter is from whom?

A. From myself, I imagine. I dictated the letter.

Q. To the National Lead Company?

A. To Mr. Hall of the National Lead Company that is in 1932.

Q. I now show you a document marked for identification as Commission's Exhibit 104-A and 104-B and I ask you to state what that is (showing to witness)?

A. Exhibit 104-B is a letter written by myself for the smelting company and addressed to the National Lead Company and represents an understanding between Mr. Hall and myself as to the price differentials in force for various deliveries of pig lead.

Q. By your company to National?

1201 A. By our company to National.

Trial Examiner Norwood: Is that A and B?

The Witness: That is exhibit 104-B.

By Mr. MacIntyre:

Q. I now show you a document—

Trial Examiner Norwood: (Interposing) Your testimony was concerning exhibit 104-A and B, wasn't it? Both sheets and one letter there?

The Witness: Pardon me, I didn't see that. It is exhibit 104-A and 104-B.

By Mr. MacIntyre:

Q. And the date of the letter is what?

A. June 28, 1932.

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 105 and I ask you to state what that is.

A. It is a letter from Mr. Hall of the National Lead Company addressed to me in which he calls my attention to the fact that one of our contracts was incorrectly made out and the price was a dollar per ton too high.

Q. I now show you a document marked for identification as Commission's Exhibit 107 and I ask you to state what that is (showing to witness).

A. It is a letter from the American Smelting and Refining Company addressed to Mr. Hall of the Na-
1202 tional Lead Company confirming receipt of the National Lead Company's instructions to ship during December 100 tons of corroding lead to the St. Louis Lead and Oil Works in St. Louis.

Q. Did you send that letter to the National Lead Company?

A. Yes. It was dictated by my assistant.

Q. This is a copy of the letter you sent?

A. Right.

Q. I now show you a document marked for identification as Commission's Exhibit 108 and I ask you to state what that is (showing to witness).

A. Exhibit 108 is a letter from Mr. Hall of the National Lead Company addressed to me confirming a telephone conversation in which the smelting company agreed to divert 100 tons of common desilverized lead.

Trial Examiner Norwood: You needn't tell us the contents of that. Just identify it.

The Witness: Giving us shipping instructions on 200 tons of lead.

By Mr. MacIntyre:

Q. You received that from the National Lead Company?

A. Yes.

Q. Now, Mr. Behr, I show you documents marked for identification as Commission's Exhibits 113, 118, 123, 136, 147, 158, 160, 173, 235, 238, 247, 270, 288, 309, 323, 336, 343, 365, 381, 388, 390, 393, 401, 409-A and B, 410, 411,
1203 425, 428 and 460, and I ask you to state whether or not you recognize those as records of memoranda

and contracts of agreements between the American Smelting and Refining Company and the National Lead Company concerning sales of pig lead, by the American Smelting and Refining Company to the National Lead Company on the dates thereon?

Mr. Welch: Objection as to the form of the question.

Trial Examiner Norwood: Objection overruled.

The Witness: I would like to ask whether I am supposed to identify every single contract separately?

Mr. MacIntyre: Yes, if you please. In other words, if you care to, go through them and satisfy yourself as to whether or not you can answer the question as to each and then give such answer as you care to give or feel justified.

Trial Examiner Norwood: See whether or not you recognize them as to what the lawyer stated them to be.

The Witness: Are these all average price contracts?

Mr. DuBose: I object to the question by the witness, if your Honor please, and I move to strike it from the record.

Trial Examiner Norwood: The objection is sustained. You were being asked what these are.

Mr. MacIntyre: May we help the witness by having 1204 the reporter read my question to him?

Trial Examiner Norwood: Yes. Read the question.

(Whereupon, the reporter read the question as follows: "Q. Now, Mr. Behr, I show you documents marked for identification as Commission's Exhibits 113, 118, 123, 136, 147, 158, 160, 173, 235, 238, 247, 270, 288, 309, 323, 336, 343, 365, 381, 388, 390, 393, 401, 409-A and B, 410, 411, 425, 428 and 460, and I ask you to state whether or not you recognize those as records of memoranda and contracts of agreements between the American Smelting and Refining Company and the National Lead Company concerning sales of pig lead, by the American Smelting and Refining Company to the National Lead Company on the dates thereon?")

The Witness: I do so recognize them.

By Mr. MacIntyre:

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 476-A and B, and I ask you to state whether you recognize that and if so as what (showing to witness)?

A. Exhibits 476-A and B is a request from the National

Lead Company to make certain shipments and to ship them as early as possible, shipments of pig lead.

Q. You recognize that as a request made by the
1205 National Lead Company to the American Smelting and Refinery Company?

A. Yes.

Q. On what date?

A. March 26, 1941.

Q. I now show you a document marked for identification as Commission's Exhibit 480, and I ask you to state what that is (showing to witness).

A. Exhibit 480 is a request from the National Lead Company to the American Smelting and Refining Company.

Mr. DuBose: I object to the witness going into the contents of the document.

Trial Examiner Norwood: Just enough to describe it for us and identify it.

The Witness: I believe this letter was received by the smelting company from the National Lead Company.

By Mr. MacIntyre:

Q. As of what date?

A. October 28, 1941.

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 493-A through 493-G and I ask you to state whether or not you recognize the signatures of the officials of the American Smelting and Refining Company as they appear thereon? (Showing to witness).

A. I recognize and know both signatures very well. Do you want me to specify them?

1206 Q. Yes, if you please.

A. Mr. W. J. O'Connor.

Q. Who is he?

A. Manager of the Utah Department of the American Smelting and Refining Company.

Q. And the other?

A. Also the signature of Mr. George Brockington, secretary of the American Smelting and Refining Company.

Q. As of what date?

A. July 17, 1943.

Mr. MacIntyre: If your Honor please, I now offer in evidence all of these documents which have been identified by the witness here this morning. That is, by the witness, Behr.

Mr. DuBose: May we have a five minute recess to look these over?

Trial Examiner Norwood: Yes. We will take a five minute recess.

(Short recess.)

Trial Examiner Norwood: Proceed. Is there any objection?

Mr. DuBose: If your Honor please, as to all of the exhibits offered in evidence marked for identification as numbers 101 to 493 inclusive without the consecutive numbers being in there, we have the general objection that
1207 we made in connection with the contract which I believe has been marked as exhibit 93-A through H. They are completely immaterial and irrelevant to the issues in this case. As to the contracts of sale which are marked exhibits 113 through 460 for identification—

Trial Examiner Norwood: (Interposing.) Wait a minute now. Marked 113 through what?

Mr. DuBose: Through exhibit 460. We have the further objection that these contracts show nothing on their face that have any relation to any of the issues in this case. They provide for the sale of corroding lead by the American Smelting and Refining Company to the National Lead Company at a price which is the current market price. They show no discrimination and we submit that therefore they are irrelevant.

As to exhibits 158 and 476-A and B, I should like to have the privilege of a preliminary examination as to certain pencil notations, the same general objection applying also to those.

As to exhibit—

Mr. MacIntyre: (Interposing.) I want to say that I am not offering the pencil notations on any of these, so for that reason I see no need for a preliminary examination
1208 Mr. DuBose: With that statement, I withdraw my request for a preliminary examination.

Trial Examiner Norwood: That related to exhibit 476-A and B only?

Mr. DuBose: There may be others. I specifically noted exhibit 158 and 476-A and B.

Trial Examiner Norwood: Proceed.

Mr. DuBose: As to exhibit 493—what are the letters on that?

Mr. Dixon: A through G.

Mr. DuBose: We submit that this is wholly irrelevant since it concerns a contract between the Clayton Silver Mines and the American Smelting and Refining Company neither of whom is a respondent in this action and there has been no proof as far as I know that Clayton Silver Mines is connected with any of the respondents.

Mr. Wood: I would like to object to all the exhibits on the ground that they are incompetent, at least at this stage in relation to any of the allegations of the complaint or the issues of the case.

I am not objecting on authenticity or lack of proof of authenticity but on the ground that they haven't been connected with the issues of the case.

Trial Examiner Norwood: Is there any further objection?

1209 (No response.)

Mr. MacIntyre: If your Honor please, all of these papers except the ones marked for identification as Commission's Exhibit 493-A to G relate to the sale as the witness has testified, to the sale of pig lead by the National Lead Company to respondent, National Lead Company.

Trial Examiner Norwood: You mean sales by American?

Mr. MacIntyre: By the American Smelting and Refining Company to the National Lead Company and in that respect they show a continuation of the practice as between those two companies in making the price of pig lead as was shown yesterday through Commission's Exhibits 93 and 94 to have originated back about the turn of the century.

This brings it down to date or practically so.

Trial Examiner Norwood: Now what about 493-A to G?

Mr. MacIntyre: 493-A to G has been authenticated both by Mr. Brockington, the secretary of the American Smelting and Refining Company when he produced it and it was marked for identification in this case, as he produced it then under subpoena duces tecum from the files of the American Smelting and Refining Company and it has been further authenticated today by this witness as a record of a contract between the American Smelting and Refining Company and the parties shown thereon pursuant to

1210 the terms of which the American Smelting and Refining Company secured ores for the refining of the same into pig lead and other resultants.

It is for the purpose of showing the terms and conditions under which and through which this pig lead is purchased by the American Smelting and Refining Company and which it in turn as shown by the other documents sells to the National Lead Company.

Mr. DuBose: If your Honor please, we admit--

Trial Examiner Norwood: (Interposing.) —Just a second. What has the Clayton Silver Mine Company to do with this? Is it owned by National?

Mr. MacIntyre: No. But this contract discloses the terms and conditions under which the American Smelting and Refining Company secures the pig lead which it sells to National as disclosed by the other contracts in the pending offer and for that reason, it is important to show the terms and conditions that American Smelting and Refining Company and the National Lead Company impose all the way from the mines down to the time that this lead pigment in the form of white lead-in-oil and otherwise is sold to the purchaser.

Mr. DuBose: I submit that that contract has nothing to do and in no way proves any of those statements made by Mr. MacIntyre:

Trial Examiner Norwood: Let me ask him one 1211 more question.

Mr. DuBose: Certainly.

Trial Examiner Norwood: Do you claim that National in any way dictates the terms of these contracts as between American and these people from whom they buy? Is there any connection between National and these people?

Mr. MacIntyre: Yes.

Trial Examiner Norwood; How is that?

Mr. MacIntyre: The price that was shown yesterday to be the applicable price for pig lead in the contracts between American Smelting and Refining Company and National Lead is used by American Smelting and Refining Company as the basis for determinng the price that will be paid for the lead content of the ores purchased from the Clayton Mine.

In other words, that all important formula of f. o. b. New York, pig lead-price, determines—and not only determines but absolutely controls the price that will be paid for the lead ores.

Mr. DuBose: If your Honor please, in the exhibits proffered in this group which have to do with contracts

between the National Lead Company and the American Smelting and Refining Company, the price is set forth as the average of the published quotations of the A. S. & R. Company for common desilverized domestic lead for
1212 New York delivery for the several business days during the month of February. I am just reading it from one of them. Now could that agreement as to what price was paid by National Lead have any influence on the Clayton Silver Mine Company in their negotiations with the American Smelting and Refining and even if they did, of what possible relevance is that in this case?

Mr. MacIntyre: If your Honor please, the answer to that question of Mr. DuBose is found in Commission's Exhibit for identification 493-B, in the paragraph entitled, "Lead" in which it is set forth the basis for determining the prices to be paid for the pig lead content of the ores purchased by the American Smelting and Refining Company.

Trial Examiner Norwood: Now are there any further objections?

Mr. DuBose: I think I have completed the statement of my objections.

Trial Examiner Norwood: I will overrule the objections and receive all of the exhibits mentioned except Commission's Exhibit for identification 493-A to G and I will reserve the ruling on that until I study not only this but some of the other contracts which were received here. I will reserve my ruling on that.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 101, 103, 104-A,
1213 104-B, 105, 107, 108, 113, 118, 123, 136, 147, 158, 160, 173, 235, 238, 247, 270, 288, 309, 323, 336, 343, 365, 381, 388, 390, 393, 401, 409-A, 409-B, 410, 411, 425, 428, 460, 476-A, 476-B, 480, were received in evidence.)

Mr. MacIntyre: That is all I have for the witness.

Trial Examiner Norwood: Is there any cross-examination?

Mr. DuBose: Yes.

Trial Examiner Norwood: I will state for the record that I shall probably carry this over during our contemplated recess and if they want to hand me any citations on the question, I will be glad to have them and mail the Commission's attorney a duplicate.

Cross-Examination by Mr. DuBose.

Q. Mr. Behr, you stated, I believe, that you have been with the American Smelting and Refining Company for 38 years?

A. Yes.

Q. Until six months ago?

A. Yes.

Q. Now when did you become assistant sales manager?

A. Sometime early in the 1920's.

Q. Sometime in the early 20's?

A. Yes.

1214 Q. And in that connection what were your duties?

A. General executive assistant to the sales manager, H. M. Brush who was vice-president.

Q. H. M. Brush, vice-president and sales manager?

A. Yes.

Q. He was your superior?

A. Right.

Q. Now you stated, I believe, on direct examination that in your opinion National Lead Company was the number one customer for corroding pig lead?

A. Yes.

Q. Is that correct?

A. Of the smelting company.

Q. Of your company?

A. Of the American Smelting and Refining Company, yes.

Q. And they were the largest purchaser of corroding pig lead for white lead manufacture; is that right?

A. I don't know what it was used for. I assume so.

Q. How in addition to corroding pig lead, what other kinds of lead did the American Smelting and Refining Company sell?

A. Common desilverized lead and the chemical pig lead, that is about all. Occasionally we sold small lots of soft Missouri lead.

Q. How did your sales generally over the years 1215 during which you were connected with the company of corroding pig lead compare with the total lead production of your company?

Mr. MacIntyre: May we have that question read?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. How did your sales generally over the years during which you were connected with the company of corroding pig lead compare with the total lead production of your company?")

The Witness: The demand for corroding lead has varied very much during different periods. There were times when we couldn't sell any corroding lead. I think there was a month or two when the National Lead Company didn't buy one ton of corroding lead and perhaps 100 tons of common desilverized lead.

That was in the 1930's and you are asking about a normal situation, as I understand it, more or less normal, how our corroding lead sales compared with the total lead sales.

Mr. MacIntyre: Now, if your Honor please, I object to the question and any further answer to the question because we are attempting now to get into fields that will probably lead us to lead pipe and a lot of other fields not related to lead pigments.

1216 Trial Examiner Norwood: This is cross-examination. Objection overruled.

The Witness: Well, I should say that during the last 20 years that about 25 per cent of our production was corroding lead. I had better say 25 to 35 per cent.

Trial Examiner Norwood: Could you give an estimate of how much of that production was sold to National?

The Witness: I couldn't do that offhand, no. I would have to look up the records of the smelting company and I really couldn't say.

Trial Examiner Norwood: You couldn't give an estimate of that?

The Witness: I would rather not. I am afraid my figures would be off.

By Mr. DuBose:

Q. So you say that the corroding pig lead production of the American Smelting and Refining Company represented about 25 to 30 per cent of that company's total lead production over the years?

A. Yes, that is 25 to 35 per cent.

Q. 25 to 35 per cent?

A. Yes.

Q. Is it not true, Mr. Behr; that electrical manufacturing companies, cable companies, wire companies, are also

large customers of the American Smelting and Refining Company?

1217 Mr. MacIntyre: I object. It is irrelevant and immaterial.

Trial Examiner Norwood: Overruled.

The Witness: Yes.

By Mr. DuBose:

Q. Prior to your becoming assistant sales manager in the early 1920's, what position did you hold with the American Smelting and Refining Company?

A. Frankly I sold the pig lead since December 1907 and practically nobody has ever interfered with me.

Q. During the handling of sales on behalf of the American Smelting and Refining Company since 1907, have you ever known of any other company other than the American Smelting and Refining Company that dictated to your company what prices you would get on your sales?

Mr. MacIntyre: I object. It calls for a conclusion and speculation, an interpretation of action.

Trial Examiner Norwood: I think he may answer that question. Objection overruled.

Mr. MacIntyre: May we have the question read?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. During the handling of sales on behalf of the American Smelting and Refining Company since

1218 1907, have you ever known of any other company other than the American Smelting and Refining Company that dictated to your company what prices you would get on your sales?")

Trial Examiner Norwood: I think that you haven't laid the grounds for that. You haven't shown that he would know whether or not some people dictate and I also think it is not within the range of the direct examination.

Mr. DuBose: If your Honor please, on the two questions your Honor raises, this man says he has handled sales of pig lead for the American Smelting and Refining Company since 1907.

He should certainly have some ideas of what the methods and practices were of that company in selling pig lead.

Trial Examiner Norwood: Well, I don't think that it would follow that he would know whether or not the prices that were given him at which he could sell these things were dictated or not dictated.

If you laid the grounds and showed that he sits in on the policy making and price making and can tell us that, why I would be glad to have that and I would overrule any objection.

But in the present state, I will sustain the objection to the question as it stands now unless there is some
1219 ground laid for it.

Mr. MacIntyre: If your Honor please, in this connection in addition to that question, I want to point out that there is in evidence already documents and the date 1907 and in fact the contracts of yesterday of 1906 showing that officials beyond this gentleman determined those prices and I want to say this that if this new matter should be gone into, it will lead us into an extended redirect and through it we will be able to show that these matters did arise even prior to 1906.

Trial Examiner Norwood: If counsel should lay the grounds for that question. Proceed.

By Mr. DuBose:

Q. Mr. Behr, during the course of your employment with the American Smelting and Refining Company, did you ever have occasion to know how prices were arrived at?

A. Yes.

Q. Will you tell us—

Mr. MacIntyre: (Interposing.) I object to the question on the ground that it is a new matter and was not gone into on direct.

Mr. DuBose: I submit, your Honor, that all of these documents were offered for the stated purpose stated by Mr. MacIntyre that National Lead Company controlled the price at which American Smelting and Refining would
1220 sell to them and in turn controlled others.

Trial Examiner Norwood: Yes, that is offered to support that contention. But this man is being cross-examined now on the evidence that was offered to support that contention and not on the contention itself.

When you combat the contention itself you will be putting in your case but there is a distinction there that I should like for us to avoid here on account of time considerations.

Mr. DuBose: I think he can tell us in a very few words the answer to the last question.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. Mr. Behr, during the course of your employment with the American Smelting and Refining Company, did you ever have occasion to know how prices were arrived at?")

Trial Examiner Norwood: Objection overruled. Answer the question as to how they were arrived at.

The Witness: We have a small committee and the committee talks it over and the matters of sales and demand are gone into and other things and on the basis of that situation, we decide whether the price is too low or too high or we make our change as we think it should be made.

1221 By Mr. DuBose:

Q. When you say "we" to whom do you refer?

A. At times it has been myself alone. Then it has been the manager with myself and at other times, the chairman of the Board might be in on the meeting or the president if it was something particularly important when we wanted to consult him.

Q. And those are all officials of the American Smelting and Refining Company?

A. Yes, all officials of the American Smelting and Refining Company.

Q. Mr. Behr, your company, the American Smelting and Refining Company, was and is in the pig lead business; is that true?

A. Yes.

Q. You sell to any purchaser, do you not?

A. We do.

Q. Including National Lead?

A. Including National Lead.

Mr. DuBose: No further cross-examination.

Mr. MacIntyre: If your Honor please, I have some questions.

Redirect Examination by Mr. MacIntyre.

Q. Mr. Behr, in connection with this question of
1222 how you made the prices, I want to call your attention to Commission's Exhibit 104-A and B, and I ask you to state whether through any decision of yours the practice was originated by your company of setting up differentials such as are indicated by that exhibit.

I am talking about the original practice of your company now.

Mr. DuBose: I object upon the ground that there has been no proof of any practice of differentials or any other practice of the American Smelting and Refining Company.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: Exception.

The Witness: This manner of doing was in vogue when I went with the American Smelting and Refining Company. In other words, notice to the National Lead Company of the differentials.

By Mr. MacIntyre:

Q. And is your answer the same to the question that quotations were made on pig lead f.o.b. New York?

A. Will you repeat that?

Q. Well, were quotations on pig lead f.o.b. in New York being made by the American Smelting and Refining Company when you went with that company?

A. Yes.

Mr. MacIntyre: That is all.

1223 Trial Examiner Norwood: Is there anything further?

Mr. DuBose: Nothing further.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wright: Your Honor, we have no further witnesses at this time in New York. May we go off the record just a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Wright: It is the intention of counsel for the Commission to resume hearings on Wednesday, July 24th at Cleveland at 10 a. m. in the Federal Building, to continue on July 29th, Monday, in St. Louis and on August 1st in Philadelphia.

This is on the understanding that counsel for Eagle-Picher and for Anaconda can produce a witness each at the hearing in Cleveland.

Mr. Gardiner: If your Honor please, I have reason to believe that we can produce the witness that is desired on that date and if for any reason that is not possible I shall notify Mr. Wright within the next several days.

Mr. Wood: I am quite confident that I can produce the witness.

1224 Trial Examiner Norwood: Well, is there anything further?

Mr. Wright: Nothing further.

Trial Examiner Norwood: Well the schedule that the counsel has announced will be followed as far as practicable. We will now adjourn this hearing to reconvene in the City of Cleveland, Ohio, in the office of the Custodian in the Federal Building in that City, at 10 o'clock Standard Time on the 24th day of July 1946. We stand adjourned.

(Whereupon, at 12:10 o'clock p. m., the hearing was adjourned.)

1225

Room 410,
Federal Building,
Cleveland, Ohio,
July 24, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, and
Paul R. Dixon, Attorneys for the Federal Trade Commission.
J. T. Welch, (Davies, Richberg, Beebe, Busick & Richardson, 15th Street N. W., Washington, D. C.) and
T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.
Henry E. Gardiner, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, New York), for Anaconda Copper Mining Company and International Smelting & Refining Company.
Richard Serviss, and
Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.
Eugene Z. Du Bose, (Alexander & Green, 120 Broadway, New York, New York), for the National Lead Company.

1226 John A. Duncan, (1649 Union Commerce Building, Cleveland, Ohio), for the Glidden Company.

1227 PROCEEDINGS.

Trial Examiner Norwood: The meeting will come to order. Pursuant to adjournment on June 27th, hearing and docket 5253, in the Matter of National Lead Company et al., is now convened in Cleveland, Ohio, in Room 410 of the Federal Building, at 10 o'clock a. m., on the 24th day of July, 1946.

The appearances are as follows: Joseph Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch and T. J. McDowell, Attorneys for Sherwin-Williams Company.

Henry E. Gardiner, Attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.

Eugene Z. Du Bose, Attorney for the National Lead Company.

John A. Duncan, Attorney for the Glidden Company.

Are counsel present and ready to proceed?

Mr. Wright: We are ready, your Honor. The witness is here.

Mr. Duncan: Step forward, Mr. Sprague.

Trial Examiner Norwood: Do you have the page number?

Mr. Wright: What is the page number?

Trial Examiner Norwood: The last number is 1224.

1228 Call your witnesses.

Mr. Wright: Paul Sprague.

Trial Examiner Norwood: Have you got a subpoena?

The Witness: Yes.

PAUL E. SPRAGUE was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Dixon.

Q. Please state your name, address, occupation for the record.

A. Paul E. Sprague, vice-president, Glidden Company, Cleveland.

Q. What are the duties and responsibilities of your present position?

Mr. Duncan: If your Honor please, just in order to make sure of the record, I want to make certain this fact: Is the Commission calling Mr. Sprague as their own witness?

Trial Examiner Norwood: Yes, as I understand it.

By Mr. Dixon:

Q. I believe the last question was what the duties and responsibilities of your present position are.

A. The Glidden Company is operated in several divisions. I am in charge of the operation of the soy bean
1229 and the feed and the pea division.

Q. I didn't understand the last word.

A. Pea.

Q. How long have you been so employed at the Glidden Company?

A. Since July, 1945.

Q. Will you start at the beginning of your affiliation with the Glidden Company and give us a chronological story of your services with the company?

A. I started in the employ of the Glidden Company in the summer of 1916, and have been employed. I have been charged with a wide variety of responsibilities during that period. I would really have to sit down and figure it out to enumerate all of them in chronological order.

Q. What was your position prior to the one that you presently hold?

A. I was in charge of the sales of the chemical, pigment, lead, and metal divisions of the Company.

Q. For how long were you in that position?

A. For approximately 10 years, beginning in 1935.

Q. For how long a period in your service with Glidden have your duties concerned the production and marketing of lead pigments?

A. Since 1925.

Q. Will you tell me what lead pigments are pres-
1230 ently produced and sold by Glidden Company, or any of its subsidiary or affiliated companies?

Mr. Duncan: I didn't hear the question.

Trial Examiner Norwood: Read it.

(Last question read.)

A. The Glidden Company has two subsidiary companies

producing lead pigments. Metals Refining Company Division produces lead oxides and—Euston Lead Company—

Q. What is the relationships of Metal Refining Company to Glidden?

A. A division of the Glidden Company.

Q. Am I correct, my understanding, it is not a separate corporate entity?

A. At this time, no.

Q. Was it ever a separate corporate entity from the Glidden Company?

A. Yes, sir; each of the divisions cited were at one time corporate entities. They were businesses that were acquired by Glidden by purchase.

Q. When was the Metals Refining Company acquired by purchase?

A. I would guess the answer, if that is satisfactory.

Q. Give us your best information.

Mr. Duncan: I object to any answer—if your Honor please, I object to any answer that is based upon a guess.

1231 Trial Examiner Norwood: Yes, speak from your own knowledge.

A. I don't know the exact time.

By Mr. Dixon:

Q. Can you give us an approximate time?

A. I believe around 1928 or '29.

Q. Where are the plants or factories operated by the Metals Refining Division of Glidden located?

A. Hammond, Indiana.

Q. What lead pigments are produced in these factories?

A. I answered that just before.

Q. In that answer I believe you said oxides. Does that include dry red lead?

A. All of the oxides of lead. That embraces the litharges and the red leads; there are a number of grades.

Q. Over what area in the United States are the lead oxides produced by the Metals Refining Division of Glidden sold?

A. Wherever the Metals Refining sales organization can secure an order.

Q. Is that throughout the United States?

A. Yes, sir; or Europe, or anywhere else in the world.

Q. Are shipments from the Metals Refining Division of Glidden made direct to customers or are they warehoused?

A. They are made direct to customers. I cannot recall about warehousing. It is 11 years since I have been
1232 in charge of that operation and I cannot recall about the warehousing.

Q. What is the relationship of the Hammond Metal Products Company to Glidden?

A. You mean the Hammond Lead Products, don't you?

Q. Yes.

A. No relation to Glidden.

Q. When was the Euston Lead Company acquired by Glidden?

A. I do not recall the date.

Mr. Duncan: Your Honor please, may I interrupt for a second?

Trial Examiner Norwood: Yes.

Mr. Duncan: Two people are here in the room and I don't know whether they are to be used as witnesses. If they are, I would like to have an order of separation.

Trial Examiner Norwood: Yes, the motion is allowed. All who are summoned here to be witnesses will please wait on the outside; there is a bench out there for you.

Mr. Wright: No other witnesses have been subpoenaed to this hearing.

Trial Examiner Norwood: I consider it, as a matter of right, if you want the other witnesses to go out, you may have it.

Go ahead.

By Mr. Wright:

1233. Q. Can you give us the approximate date when the Euston Lead Company was acquired by Glidden?

A. I believe about 1923.

Q. Since the date of the acquisition, it has been operated, has it, as a division of Glidden Company?

A. Both as a separate corporation, taken over and absorbed and merged with the Glidden Company.

Q. Where is the plant operated by the Euston Lead Company located?

A. Scranton, Pennsylvania.

Q. That is the only factory operated by that division?

A. That is right.

Q. What is produced in the Scranton plant?

A. Basic carbonate, white lead, and white lead in oil.

Q. Is lead sulphate produced by Euston?

A. No, sir.

Q. Does the Glidden Company solicit the sale of the lead pigments which it produces throughout the entire United States?

A. Wherever the Glidden Paint Divisions have a sales representation, white lead is available for sale and is solicited.

Q. Mr. Sprague, will you state to us as briefly as you can the present method of quoting delivered prices on white lead and oil employed by the Glidden Company?

1234 Mr. Duncan: I object your Honor; the complaint is confined to a definite time. His question is in the present tense. It relates to the pre t time rather than the time in the amended complaint; erefore, I object to the question.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: Question withdrawn.

By Mr. Wright:

Q. Will you state, Mr. Sprague, the method of quoting delivered prices, terms and conditions of sale for white lead in oil that was employed by the Glidden Company during 1942?

A. The method?

Mr. Duncan: I object to the question, your Honor; unless the question includes a definition of the terms. I don't believe it is a fair question to put to the witness.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Objection overruled. Counsel may clarify and call for definitions if it isn't perfectly clear. Off the record.

(Discussion, off the record.)

Tria Examiner Norwood: On the record.

Mr. Duncan: If your Honor please, of course, the question which was put assumes that they did have a

1235 method.

Trial Examiner Norwood: Yes. If counsel objects on that ground—

Mr. Duncan: I object.

Mr. Wright: Your Honor, it is perfectly possible to quote terms and prices and conditions of sales on this. All I am trying to get is how they quoted the prices, terms and conditions.

Trial Examiner Norwood: Read the question.

Mr. Duncan: I didn't ask it that way.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: You may lay the ground for that as to whether they did quote delivered prices and terms. I will sustain the objection to the question as to the form of it.

By Mr. Wright:

Q. Mr. Sprague, will you state the terms and conditions of sale quoted by the Glidden Company for white lead in oil during the year 1942?

A. The sale of white lead in oil in 1942 by the Glidden Company was—the sales, rather, were handled in different ways. The bulk of the white lead in oil sold by the Glidden Company was sold by the Paint Division or the Paint Sales organization. I was not in charge of that organiza-
1236 tion and I would have to consult them to be perfectly certain about a detailed answer to your question. The white lead in oil was also sold during that period principally, not entirely, to different clients in the trade by the Euston Lead Division.

I was in administrative charge of the sales of that division and I can answer your question, if I understand it correctly, by saying that white lead in oil was tendered for sale at a price, and if it was agreeable to the buyer, an order was entered and accepted and shipped.

Q. Are you familiar with the terms and conditions of sale quoted by the Glidden Company on dry white lead during the year 1942?

A. Yes, sir.

Q. Will you please state the terms and conditions of sale which were employed by the Glidden Company in offering for sale dry white lead in 1942?

Mr. Duncan: If your Honor please, I object to the question, inasmuch as I understand it, the OPA had—was in effect in 1942 and therefore it is not germane in this case what the terms or conditions were of sale.

Trial Examiner Norwood: Objection overruled. The witness may give us that information.

Answer the question.

A. Repeat the question, please.

1237 (Last question read.)

Trial Examiner Norwood: Answer the question.

A. The terms were net cash, 30 days, less one per cent

for cash in 10 days. Conditions were delivered f.o.b. the plant at Scranton, Pennsylvania, with transportation charges as paid by the seller allowed to the buyer. Correction, transportation charges allowed by the seller to the buyer.

Q. Am I correct in my understanding, then, that the f.o.b.—of your testimony, that the f.o.b. Scranton price, with transportation paid by the seller was applicable throughout the entire United States?

A. All of the transportation charges that were paid by the seller—buyer, were allowed by the seller at the current public freight rates. If the seller paid the charges in a shipment, there was no allowance to the buyer.

Mr. Duncan: If your Honor please, we move the answer go out of the record on the theory that freight rates have nothing to do with this case. They are only a part of cost and are not a part of price and price is the term that is used in the statute.

Mr. Wright: Your Honor, we ask—I asked the witness the terms and conditions of sale. He gave a statement of those terms and conditions. Part of those terms and conditions were how the freight charges were to be handled, I think the answer is responsible.

1238 Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Mr. Sprague, you mentioned that there was an f.o.b. Scranton price.

Mr. Duncan: If your Honor please, I don't mean to interrupt each time, but I would like to take objection—make an objection to each question which Mr. Wright asks and each answer that is given by this witness which in any way relates to freight.

Trial Examiner Norwood: Counsel may have objection to that entire line.

Mr. Duncan: Thank you.

Proceed.

By Mr. Wright:

Q. Will you please explain the f.o.b. Scranton price that you mentioned?

A. The intent of the Euston Lead Company in the sale of its dry white lead in 1942 was to pay only charges for delivery charges to the buyer wherever he might be located. In pricing goods with that intent, there always arises a

question as to who shall pay the transportation charges actually, whether the buyer pays them and is allowed for them by the seller, or whether the seller pays them directly.

Since the payment by the seller of freight charges involves an outlay of cash, it is frequently desirable to
1239 sell at a delivered price, the understanding being that the charges will be paid by the buyer and deducted from the seller's invoice. I believe the latter practice is the one that was generally followed by the Euston Lead Company.

If the sale of white lead dry were made to a buyer in Scranton, he would pay the same price for the white lead as a similar amount of white lead sold at the same time to a buyer located in Chicago.

Q. Well now, would a buyer located in California, in the period of 1942, pay the same price as the buyer in Scranton?

Mr. Duncan: I object, your Honor, and for this reason: The question is on direct examination and it assumes a case, rather than referring to any actual case.

Mr. Wright: Your Honor, we have had testimony that the Glidden Company solicits and sells these pigments throughout the United States and the witness himself, in his answer, assumed a case of comparison with Chicago and Scranton. I am just clarifying it.

Trial Examiner Norwood: The scope of the investigation is not directed to the question of whether actual goods were sent to the west coast, but it is directed to the question of whether there is a price system and if there is a price system what that price system is.

He has a right to ask him that factual matter as to what was involved in the system with respect to mak-
1240 ing prices at this location.

Counsel has another question there about freight being no part of the price. There is a contention that the freight is a part of the price, and I think in order to determine whether or not that is correct or incorrect, we will have to let in this information about all the things which could reasonably be price factors. We shall have to let this in.

I will inform the counsel that our procedure is a little broader than jury cases.

Mr. Duncan: So I notice.

Trial Examiner Norwood: We must get the facts.

Go ahead. Off the record.

(Discussion, off the record.)

Trial Examiner Norwood: On the record.

Objection overruled.

The Witness: What is the question again, please?

(Last question read.)

A. It depends on the time of purchase.

By Mr. Wright:

Q. Just a minute, I will clarify that. Would two buyers with the same trade classification purchasing white lead at the same specifications and in the same types of containers and in the same quantities, on the same day, pay the same price, one located in Scranton and one located in San Francisco?

1241 Mr. Duncan: I object, your Honor. This again assumes a case, refers to no direct case. Furthermore, I don't know that the witness qualified himself to answer that as an expert.

Trial Examiner Norwood: I will overrule that. I conclude that he means that, according to this price method that is followed—that was followed at that time, would these prices be the same. The witness may answer from that standpoint.

Mr. Wright: Your Honor, I would like to add that this is a vice-president of Glidden Company who has been working in this position for a number of years. I don't know where we would find a man better qualified.

Mr. Duncan: The question is whether the record so shows, not what you stated.

Mr. Wright: It has been testified to that he was experienced in this field.

Trial Examiner Norwood: Go ahead.

The Witness: I don't recall whether the price prevalent on the part of the Euston Lead Company for dry white lead delivered in California, was the same as the price prevailing for delivery elsewhere. I believe there was a difference in prices. The answer to the question, then, would be under those conditions, the quotation made by the Euston Lead Company would be its California price to a California

1242 buyer, and the price to a buyer elsewhere, the price to a buyer elsewhere—

Q. Do I understand your testimony then, that you do not know whether there was a differential in price between the California buyer over the Scranton buyer?

Mr. Duncan: I object, your Honor. The witness has

already testified and this is direct examination, as to what the Examiner—as to what the attorney for the Federal Trade Commission understands the answer to be, as showing that is not a part of this record. He asks it in such form.

Mr. Wright: Your Honor, I will submit that the answer to the last question wasn't entirely clear, and furthermore, that while the present witness is a witness called by the Commission, he could be hardly termed a friendly witness under the circumstances.

I believe I should have some latitude in questioning him.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: I overrule the objection if counsel will substitute "should" for "do"—say "should I understand."

Mr. Wright: I will accept the substitution, your Honor.

The Witness: I do not recall for certain whether there was at that time a difference in the price in California 1243 and other buyers located elsewhere under similar conditions.

By Mr. Wright:

Q. Do you recall whether, in 1942, there were any geographical areas or zones anywhere in the United States to customers within which the Glidden Company charged a differential than customers in other zones in the sale of dry white lead?

Mr. Duncan: I object, your Honor.

Trial Examiner Norwood: Read it.

(Last question read.)

Trial Examiner Norwood: Overruled.

A. I would have to check back the price list records to answer that with certainty. I think there was a difference existing in the Pacific coast.

Mr. Duncan: I object to that part of the answer which relates to what he thinks. It is a question of what he knows.

Trial Examiner Norwood: Let him finish his answer and you may move to strike.

The Witness: That is the end of the answer.

Mr. Duncan: I move to strike the last part of the answer where he says "I think," so and so.

Mr. Wright: Your Honor, I submit that the vice-president of the Glidden Company, who has, by his own state-

ment, been concerned with the production and sale
1244 of these pigments over a period of 20 years should be qualified to state what he thinks the practice of the company was at that time.

Trial Examiner Norwood: Then read the answer.

(Last answer read.)

Trial Examiner Norwood: I overrule the objection.

By Mr. Wright:

Q. Do you recall whether that difference applied to customers located in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming?

Mr. Duncan: Objection, your Honor. I don't like to bob up all the time, but apparently he confines this to 1942, but he doesn't say four months, 12 months, in 1942, or any number of months.

Trial Examiner Norwood: That can be clarified.

Mr. Wright: I will amend the question by stating at any time during 1942.

Trial Examiner Norwood: Objection overruled.

Mr. Duncan: Withdraw the objection.

A. I do not recall the price relationships in the specific areas or states that you mentioned. Whatever the competitive price schedule was in those states, as well as any other parts of the United States, was recognized in the quotations of the Euston Lead Company.

Mr. Wright: Your Honor, I move to strike out
1245 the last part of that answer as not responsive to the question.

Mr. Duncan: Your Honor, I ask it stay in.

Mr. Wright: Entirely gratuitous and spontaneous.

Mr. Duncan: He is your witness.

(Last question and answer read.)

Mr. Wright: My objection goes to the statement beginning "Whatever."

Trial Examiner Norwood: Motion allowed.

Mr. Duncan: Exception.

Mr. DuBose: May we have an exception to that?

Trial Examiner Norwood: Yes.

You can bring that material out on your cross-examination. I think the counsel has a right to narrate answers to his questions.

By Mr. Wright:

Q. Mr. Sprague, when was the last time you were in actual charge and control of the marketing of pigments for the Glidden Company?

A. I was in administrative charge of the pigment sales until July, 1945.

Q. You were in that position over how long a period?

A. Approximately 10 years.

Q. That is, from 1935 to 1945?

A. Yes.

Q. Do you recall the method of quoting terms and
1246 conditions of sale by the Glidden Company on dry white lead in 1935, at the time you assumed that position?

Mr. Duncan: We object, your Honor, for the same reason given before. The same kind of question was asked.

Trial Examiner Norwood: On the grounds of leading, was it?

Mr. Duncan: Yes, your Honor, and on the ground that it assumes a suppositious case rather than an actual case.

The Witness: Yes, sir.

By Mr. Wright:

Q. Were there at that time any zones or territories within which—to customers within which the Glidden Company quoted a differential on account of their location, over other customers located in the eastern part of the United States?

Mr. Duncan: Objection on the ground that he uses the term zones or territories; he doesn't define the use. He doesn't define what he means by zone or territory.

Mr. Wright: The question itself included that, zone or territory within which prices were quoted to customers at a differential higher than to customers in the eastern part of the United States.

Trial Examiner Norwood: Overruled, answer the question.

Do you want it read?

1247 The Witness: No, sir.

I think it would—I may be able to clarify my answers to these questions if I explain that the position of the Euston Lead Company in the sale of dry white lead was that of a small factory in the industry, and it was necessary at all times for the Euston Lead Company to meet competition that it found in that business.

By Mr. Wright:

Q. Now, just a minute there.

I can see the answer the witness is about to give is not responsive to the question. I asked a specific question of conditions and terms of sale quoted by the Glidden Company at that time, not any reason for why he quoted them, but what they quoted.

Mr. Duncan: Your Honor, I—

Trial Examiner Norwood: I think that the able counsel for the Glidden Company will know how to bring out this witness' explanation of anything they want to bring out here, and I will instruct the witness not to take it upon himself to make the explanations such as he just made. You had better just answer the questions and then let your counsel bring out their side of it, any explanations that they deem wise, so I will ask the reporter to read that question and ask the witness to answer it, de novo.

(Last question read.)

1248 Trial Examiner Norwood: Answer as to that fact.

A. I do not recall.

By Mr. Wright:

Q. Do you recall whether there were such zones or territories taking a differential on dry white lead during 1936?

A. I do not recall.

Q. During 1937?

A. Ditto.

Q. 1938?

A. Ditto.

Q. 1939?

A. Ditto.

Q. 1940?

A. Ditto.

Q. 1941?

A. Ditto.

Mr. DuBose: May we have a five-minute recess, your Honor?

Trial Examiner Norwood: Five-minute recess. The witness will not discuss anything with anybody while he is on the stand.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Sprague, will you state the terms and the
1249 conditions of sale which were quoted by the Glidden Company at any time during the year 1942, on dry red lead in bags or barrels, in less than carload quantities?

A. The terms of sale were net cash, 30 days, one per cent cash discount for cash in 10 days. Those are the payment terms. Conditions of sale were that the price would be agreed upon by the buyer and the seller, and at that price, the goods were delivered to the seller and cost of delivery paid by the buyer—cost of delivery paid by the seller.

Q. In selling dry red lead in bags and barrels in that period, did the Glidden Company generally pre-pay the freight?

Mr. Duncan: I object, your Honor, to the question, inasmuch as it uses the word "generally," and certainly that question on direct examination is an improper question of the witness.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Objection overruled.

The Witness: What is the period?

By Mr. Wright:

Q. 1942.

A. I believe Glidden generally allowed the freight.

Trial Examiner Norwood: That means that the customer paid the freight and deducted it from the bill?

The Witness: Correct.

1250 By Mr. Wright:

Q. In quoting on dry red lead in bags or barrels in less than carload quantities during 1942, was the delivered quotation different to some customers on account of the destination or the place where the leads—

Mr. DuBose: If the Court please, I object to that on behalf of the Respondents, because of the use of the word quotation. I don't believe we are concerned with the quotation rather than the actual price paid.

Mr. Wright: I am asking about quotations.

Mr. DuBose: I object to the quotation. I don't think it has anything to do with this proceeding, quotation as distinguished from actual price paid.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Did you finish the question?

Mr. Wright: Yes, sir.

In answer to the objection which has been made, I will call your Honor's attention to paragraph 8 which charges the offering and quoting for sale of lead rather than the actual sale.

Mr. DuBose: We say that is irrelevant.

Trial Examiner Norwood: I don't see how I can separate that end of it. I can't discriminate that finely now, because certainly quotations have something to do
1251 with price. It is some evidence of what this commodity was sold at in these places. I don't think I can allow that objection.

Objection overruled.

Will you answer the question?

The Witness: The only differences in price that were quoted by the Glidden Company were those involved in meeting competition.

Mr. Wright: Your Honor, I move to strike that.

Trial Examiner Norwood: Motion allowed.

Mr. Wright: As not responsive.

Mr. Duncan: Exception.

Trial Examiner Norwood: The witness is instructed to answer those questions factually and not argue. You had better leave that to the lawyers.

The Witness: I am under oath to testify to the whole truth and I am doing so. I beg your pardon, sir.

Trial Examiner Norwood: Well, you are not to testify to anything except concerning those matters which are asked of you. You answer the questions, the whole truth about the question factually. You are not on the stand to argue the case.

Mr. Duncan: Your Honor, just to make ourselves—so we understand one another—

Trial Examiner Norwood: Yes.

Mr. Duncan: In the event a witness is unable to
1252 answer a question in any other way, do I understand that the Examiner in this proceeding feels that he has no right to answer?

Mr. Wright: Your Honor—

Trial Examiner Norwood: No, you are not to understand that. I think my instructions to the witness were very clear. He is on the stand here to swear to the facts

and to answer these questions, and not to argue the case or give explanations when he is not asked to do so.

Mr. Duncan: I see. I just wondered.

Trial Examiner Norwood: I think—off the record.

(Discussion, off the record.)

Trial Examiner Norwood: On the record.

Mr. Duncan: Of course, in this case, your Honor, in the event the Commission establishes a case, then I assume—

Trial Examiner Norwood: Establishes what?

Mr. Duncan: Establishes its case by substantial evidence, then the burden is upon the Respondents to explain, possibly justify, if able, the price discriminations, if any, that have been established with reference to Count 2 in the amended complaint.

Trial Examiner Norwood: I think so, yes.

Mr. Duncan: That presupposes, I think, the burden of establishing, in the first instance, price discrimina-
1253 tions of Count 2 in the amended complaint.

That is right, is it not?

Trial Examiner Norwood: What do you mean?

Mr. Duncan: What I am getting at is this: The answer which Mr. Sprague gave to the question which Mr. Wright asked and which your Honor had stricken from the transcript, relates—

Trial Examiner Norwood: That whole question up here—counsel has the statutes there with respect to the burden of showing justification. We all know what that is. That is not involved here. The question is: What is the witness' answer in response to the question? Was it responsive to the question? That is what I am asking the witness to do, is to make his answers responsive to the questions.

Now, counsel may bring out all explanations—they will have abundant opportunity for anybody to bring out any explanation he wants to about anything that is established factually.

Let us proceed directly, without too much altercation, to bringing these facts out.

Mr. DuBose: May we have the question again, please?

Trial Examiner Norwood: Read the question.

(The reporter again read the last question.)

Mr. Wright: I will withdraw that question and rephrase it.

1254 By Mr. Wright:

Q. Mr. Sprague, during 1942, quoting on dry red lead, bags or barrels in less than carload quantities, was a differential quoted by the Glidden Company for delivery to customers located within certain geographical areas over the prices quoted to customers located at or near the factories of the Glidden Company?

Mr. Duncan: Objection, your Honor.

Trial Examiner Norwood: Overruled.

A. Yes, sir.

By Mr. Wright:

Q. Will you state what that differential was, if you recall?

A. Differential was whatever was established by competition.

Mr. Wright: Your Honor, I move to strike that answer.

Mr. DuBose: I submit, your Honor, that is a factual answer.

Trial Examiner Norwood: I think he has a right to make that answer. Objection overruled.

You may question him further on that.

By Mr. Wright:

Q. Mr. Sprague, did you, during 1942, publish price cards and price information on dry red lead in less than carload lots, bags or barrels?

A. Yes, sir.

1255 Q. Did, during that period, the Glidden Company generally sell in accordance with the terms and conditions of those price cards and price announcements?

Mr. Duncan: I object again.

Trial Examiner Norwood: Objection overruled.

A. Sales were made both in accordance therewith and not in accordance therewith.

Q. Did the price cards that were published for these products at that time by the Glidden Company quote a price, a delivered price which was applicable throughout the entire United States?

Mr. Duncan: I object to the question, your Honor. It is immaterial and irrelevant.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: May I object on the ground that it is not the best evidence. I think we have the price cards in evi-

dence. Whatever they show, they would speak for themselves.

Trial Examiner Norwood: No best evidence rule as to price cards, unless the issue is what the price card shows. If the price card itself were in issue, it would be the best evidence, but not as to what the prices were.

Mr. DuBose: Perhaps I am misinformed about the question. May I have the question again?

Trial Examiner Norwood: Read it.

1256 (Last question read.)

Trial Examiner Norwood: Objection overruled, answer the question.

A. All price cards quoted prices subject to confirmation. My recollection is that the cards did not cover the entire United States.

Mr. Duncan: If your Honor please, I understand that the subpoena issued by the Commission on Mr. Kolb, secretary of the Glidden Company, and who has been asked to bring in with him certain price cards which we now do not have available here, since they are over being photostated; but we will have them available. Apparently, if that is later introduced, that is those price cards, then they would be the best evidence, and whatever this witness would say with reference to them, as I see it, should be stricken from the record.

Mr. Wright: May we go off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Recess until one o'clock.

(Whereupon, at 11:30 a. m., a recess was taken until 1:00 p. m., this day.)

1257 Afternoon Session.

1:00 p. m.

Trial Examiner Norwood: A ruling which I made just a short time prior to our recess requires reconsideration because I didn't understand that the question asked by Mr. Wright was directed to what the price cards contained.

Mr. Wright's question is as follows: "Did the price cards that were published for these products at that time by the Glidden Company quote a price, a delivered price, which was throughout the entire United States?"

I didn't understand that the question was so worded

when I overruled Mr. DuBose's objection there on the grounds that the cards were the best evidence. As the question is directed there, he is correct and my ruling is reversed, and the question is rejected.

Mr. Duncan: Then I assume, your Honor, that the answer given by the witness will also be stricken from the record?

Trial Examiner Norwood: Yes.

Mr. Wright: I would like to call Mr. Kolb.

Mr. Duncan: Do I understand, your Honor, that the Commission is now calling Mr. Kolb as its own witness?

Trial Examiner Norwood: Yes.

Mr. Wright: Your Honor, I would like to state for the record, I don't believe the record shows our agreement
1258 prior to lunch that Mr. Sprague would be withdrawn temporarily while Mr. Kolb was called and made a return of the subpoena.

Trial Examiner Norwood: Mr. Sprague is withdrawn and you may proceed to examine Mr. Kolb.

CLIFTON M. KOLB was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name and occupation for the record, Mr. Kolb?

A. My name is Clifton M. Kolb, I am secretary of the Glidden Company.

Q. Were you served with a subpoena duces tecum, issued on the 11th day of July, 1946, by the Federal Trade Commission?

A. I was.

Q. Are you prepared to make a return of that subpoena at this time?

A. Yes.

Q. Are you producing the documents called for under Specification 1?

A. I am producing the price cards covering Huston dry white lead within the range of packages called for in
1259 the subpoena, and applying to our base territory. I can give you the numbers of them.

I am also producing the cards in the same category covering red lead and litharge.

Mr. Wright: I would like to have these exhibits marked as Commission's Exhibits 810-A, B, C, D, E, F, G, H, I and J.

The Witness: I would like to explain that there is one of the Euston Lead cards—

Mr. Wright: Just a moment, while the reporter marks the exhibits, please.

(The documents referred to were marked Commission's Exhibits 810-A, B, C, D, E, F, G, H, I and J, for identification.)

By Mr. Wright:

Q. Did you also produce the documents called for under Specification 2?

A. I secured all the contracts that I could find in our offices relative to the sale of dry white lead in the City of St. Louis. I have been unable to locate any other contracts than the ones that I have.

Mr. Wright: Will you mark these as Commission's Exhibits 811-A and B, 812, 813, 814, 815, 816, 817, 818, 819-A and B, 820, 821 and 822?

Mr. DuBose: For identification?

1260 Mr. Wright: Yes.

(The documents referred to were marked Commission's Exhibits 811-A, 811-B; 812; 813; 814; 815; 816; 817; 818; 819-A and 819-B; 820; 821 and 822, for identification.)

By Mr. Wright:

Q. I show you Commission's Exhibit 822 for identification and ask you if that is the subpoena you received?

A. Yes, it is.

Q. I show you documents marked for identification Commission's Exhibits 810-A, B, C and D, for identification, and ask you to state what they are, Mr. Kolb.

A. These are price cards published by our division, Euston Lead Company, January 26, '42; January 1, '37; January 1, '34; and December 30, 1932. They cover dry white lead in less than carloads in our base territory.

Q. Can you state what the base territory—the extent of the base territory is to which you refer?

A. I am not familiar with the boundaries of this territory at this time. I will look it up, but it is the territory,

as I understand, in the central and eastern part of the United States, but I don't know the exact boundaries of it.

Q. These cards, if I understand your testimony, quote a price that applies only to that central or home zone or territory.

1261 A. That is correct.

Q. Do you know whether there was a different price quoted in the other territories?

A. I do not. I would like to—pardon me.

Q. These then, I take it, are the only cards and announcements which could be produced in response to specification 1 with reference to dry white lead?

A. That is correct, those are the only ones I could find.

Q. I show you documents marked for identification as Commission's Exhibits 810-E, F, G, H, I and J, and ask you to state what those are.

A. These are price cards dated December 30, 1932; October 26, 1933; June 29, 1934; September 19, 1935; December 22, 1936; and January 15, 1942. They cover pure red lead and pure litharge in steel drums, 500 and 600 pounds, and they cover prices in our base territory. I am not sure as to the price on January 1, 1937, as indicated by the subpoena. The closest I could get to that was this card of December 22, 1936, Card No. 46. I doubt if there was a change in price between December 22nd and January 1st.

Q. Do you know the base territory, the extent of it, geographical limits of it?

A. I cannot give you the boundaries of it, but I understand it is the central and eastern part of the United States.

1262 Q. Do you know whether there was a differential added to those prices for delivery in other territories than the central—

A. I do not know.

Q. I show you a document marked for identification as Commission's Exhibit 811-A and B, and ask you to state what it is.

A. Contract between our division, Euston Lead Company, and Schulte Paint & Lacquer Company, St. Louis, Missouri, dated December 15, 1941, covering dry white lead.

Mr. Duncan: If your Honor please, I assume that the Commission's attorney will introduce these documents in

evidence. I don't know whether he plans to ask the witness with respect to each of these contracts, what it purports to be. On the other hand, I do think if he does intend to do that, I want to object at this time because the best evidence is the document itself.

Trial Examiner Norwood: Counsel is correct. Counsel will please confine himself at this time to identifying the papers.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 812 and ask you if you recognize that?

A. This exhibit is a contract between Euston Lead Company, Division of the Glidden Company, and Floor
1263 Shines Paint & Varnish Company, St. Louis, Missouri, dated February 5, 1931, covering the sale of dry white lead.

Q. I show you Commission's Exhibit for identification 813, and ask you to state what that is.

A. Contract between Euston Lead Company, Division of Glidden and Banner Supply Company, St. Louis, Missouri, dated May 13, 1941, covering dry white lead.

Q. I will show you Commission's Exhibit 814 for identification.

A. Contract between Euston Lead Company and P. D. George Company, St. Louis, Missouri, dated June 28, 1941, covering dry white lead.

Q. I show you Commission's Exhibit 815 for identification and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Mar-Kac, Manufacturing Company, St. Louis, Missouri, dated April 5, 1941, covering dry white lead.

Q. I show you Exhibit 816 and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Mound City Paint & Color Company, St. Louis, Missouri, dated July 1, 1941, covering dry white lead.

Q. I show you Commission's Exhibit 17 for identification and ask you to state what it is.

A. Contract between Euston Lead Company, Di-
1264 vision of Glidden Company, and Robbins Varnish Company, St. Louis, Missouri, dated June 30, 1941, covering dry white lead.

Q. Show you Commission's Exhibit 818 for identification and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Republic Paint & Oil Company, St. Louis, Missouri, dated May 13, 1941, covering dry white lead.

Q. I show you Commission's Exhibit 819, A and B, and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Mechanics Paint Company, St. Louis, Missouri, dated December 15, 1941, covering dry white lead; attached to it is a letter dated March 20th, addressed to Mechanics Paint Company, relative to a modification of the contract.

Q. I will show you Commission's Exhibit 820 and ask you to state what it is.

A. Contract between Euston Lead Company, Division of the Glidden Company, and Steelcote Manufacturing Company, St. Louis, Missouri, dated June 20, 1941, covering dry white lead.

Q. Show you Commission's Exhibit 821 for identification, and ask you to state what it is.

A. Contract between Euston Lead Company, Glidden Company, and Cardinal Paint Corporation, St. Louis, Missouri, dated June 30, 1941, covering dry white lead.

1265

Q. Mr. Kolb, were you able to locate any contracts covering litharge during—effective on those dates?

A. I wrote to our division at Hammond, Indiana. Their records for that period have been destroyed and I was unable to secure any contracts or records.

Q. Were you able to secure any contracts covering the sale of dry red lead?

A. No, they were at Hammond, and they were destroyed.

Mr. Wright: I offer Commission's Exhibits 810-A through J, into evidence.

Mr. Duncan: We object, your Honor, and for this reason: With respect to the exhibits marked 810-A and exhibits marked 810-B, they relate to a period before 1936. Count 2 of the amended complaint is limited to the period beginning in 1936 and 1937. We object, then, to the Exhibits 810-A and B, being introduced in evidence.

Mr. Wright: The same objection might apply to E, F, G and H, too.

Mr. Duncan: That is right, we are making the same objection.

Mr. Wright: Your Honor, that objection has been raised in the past and I submit particularly with reference to Count 1 that this material is competent and relevant.

Mr. Duncan: Do I understand counsel for the
1266 Commission to say he is offering in evidence 810, A and B, 810-E through H, inclusive, merely in support of Count 1?

Mr. Wright: I am offering them as price quotations of the Glidden Company as of those dates.

Mr. Duncan: Then we object.

Mr. Welch: Mr. Examiner, I think the objection on the Robinson patent on Count 2 was originally made by me for Sherwin-Williams. I believe your Honor took that ruling under advisement and reserved a ruling and has never announced a ruling one way or the other.

Is my recollection correct?

Mr. Wright: I don't recall that there was any ruling hanging like that, Mr. Welch.

Mr. Welch: I understood there was.

Trial Examiner Norwood: I usually take those things subject to being applied as they may reasonably and legally be applied.

Now, in some aspects of the price discrimination issue, the nature of the method being employed might be relevant on that particular feature and I just have a hazy recollection that I made some such explanation in overruling your objections in this case.

Mr. DuBose: I don't know if my recollection is correct or not, but I think you took it subject to a motion to strike or something like that.

1267 Trial Examiner Norwood: Yes, I might have done that; yes.

Mr. Wright: I am only certain that there was no reservation of ruling on an exhibit.

Trial Examiner Norwood: On that situation now, it has so many different angles that we would have to stop and have quite a discussion, and I would have to ask you for authorities and study that thing before I would be perfectly satisfied to rule something out here that may have value to the Commission.

Mr. Duncan: Your Honor, my objection I believe referred to E through H, inclusive. I meant E through J, inclusive. I want the record to so state.

Trial Examiner Norwood: It may do so.

Mr. Duncan: As well as A and B of that same number.

Mr. Welch: Mr. Examiner, I found a place in the record —this may be off the record—

Trial Examiner Norwood: Yes.

Mr. Welch: I am quoting page 933.

Trial Examiner Norwood: Off the record.

(Discussion, off the record.)

Trial Examiner Norwood: On the record.

Any further objections to the exhibits?

Mr. DuBose: I would like to join in the objection 1268 made by Mr. Duncan. I think all the Respondents object.

Trial Examiner Norwood: Has it been called to my attention that this objection here which involves the application of these price cards to Count 2 has the same basis as the objection discussed in the record at page 933, and the pages following?

I will say that my ruling which I am about to make will apply to that situation also, and that is that the objections are overruled and these cards are received in evidence for all purposes except the fact of price discrimination under the Robinson-Patman Act.

Since these activities here all antedate the said act—

Mr. Wright: Will your Honor clarify the last statement? I am not sure I understand the reservation.

Trial Examiner Norwood: They are not received as factual evidence that they did sell to different people at different prices subsequent to the passage of the Robinson-Patman Act. They are received for all other purposes than that, and I think that reservation means very little because there is no power on earth that could apply those to proving that they sold at different prices.

(The papers referred to, herefofore marked for identification COMMISSION'S EXHIBITS 810-A, 810-B, 810-C, 810-D, 810-E, 810-F, 810-G, 810-H, 810-I, and 810-J, 1268a were received in evidence.)

Mr. Wright: Do I understand your Honor's ruling then that these exhibits could be used to show, along with other evidence, the purpose and intention of the Glidden Company—

Trial Examiner Norwood: I think so.

Mr. Wright: —at that time, for purposes of Count 2?

Trial Examiner Norwood: I think so. It may appear

that they will be valuable in that respect. I don't say that they do at this time.

Mr. Welch: Do I understand that it will be your Honor's position that purpose is a factor in connection with violation of the Robinson-Patman Act?

Trial Examiner Norwood: The effect is.

Mr. Welch: And the effect of prices made on merchandise sold and paid for before June 16, 1936, is a factor in the violation charged in 1946 of the Robinson-Patman Act?

Trial Examiner Norwood: I think we had better go into that later.

Mr. Welch: Your Honor made some statements to the counsel for the Commission and I wanted to understand if that was your position.

Trial Examiner Norwood: Read the statement.

(Statement read.)

1269 Trial Examiner Norwood: It may be a factor to show the effects.

Mr. Welch: Exception on behalf of Sherwin-Williams.

Mr. Duncan: Your Honor, I note that the Respondent Sherwin-Williams takes exception to your ruling. I understood it is not necessary for any of the Respondents to take any exception to your ruling. It is implied.

Trial Examiner Norwood: That is right, you have all your exceptions taken care of.

Mr. DuBose: I would like to make a motion for the record that these exhibits just received be stricken from the record so far as they relate to Count 2 of the amended complaint.

Mr. Wright: Your Honor, you just already ruled on that.

Trial Examiner Norwood: I don't think that is in order. I just ruled on that and ruled that they can come in.

Mr. DuBose: I thought to protect our position, we might make a motion to strike as relates to Count 2.

Trial Examiner Norwood: Motion denied.

Mr. DuBose: Exception.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibits 811, A and B, 812, 813, 814, 815, 816, 817, 818, 819-A and B, 820 and 821.

Trial Examiner Norwood: Any objection? They 1270 are received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 811-A, 811-B,

812, 813, 814, 815, 816, 817, 818, 819-A, 819-B, and 820 and 821, were received in evidence.)

Mr. Wright: I offer in evidence Commission's Exhibit for identification No. 822.

Trial Examiner Norwood: I suppose you offer this to show—

Mr. Wright: To show what was called for.

Trial Examiner Norwood: It may be received.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 822, was received in evidence.)

Mr. Wright: I have no further questions of this witness.

Mr. Duncan: No questions.

I assume counsel for Respondents will have an opportunity to cross-examine him at some later time.

Trial Examiner Norwood: The cross-examination will have to be confined to this identification.

Mr. Duncan: We reserve the right to cross-examine him at some later time. I don't want to have to do it now.

Trial Examiner Norwood: Inasmuch as I recall—correct me if I am mistaken—this examination has been
1271 confined strictly to the identification of these papers and the cross-examination would have to be within that scope, and it is necessary that it be at this time.

Mr. Welch: Your Honor, may we have a recess at this time?

Trial Examiner Norwood: Yes, short recess at this time.

(A short recess was had.)

Cross-Examination by Mr. Duncan.

Q. Mr. Kolb, you referred to your inability to—withdraw the question. On direct examination, Mr. Kolb, I understood you to testify that you were unable to bring in some records which were asked for by Specification in the subpoena duces tecum. Will you explain to the Commissioner just what happened to those records, when they were destroyed and so forth.

A. I knew that I would have to find the price cards and contracts covering red lead in our Hammond, Indiana, office. That is where they were kept. I got in touch with the manager of the Hammond, Indiana, office, asking for this information. I sent him a copy of the subpoena, and

he relied, after investigating, that our general accounting department at Cleveland had sent a representative to Hammond early in 1946, and they had installed a new office system and he stated that when that was put into effect, all of the records prior to January 1, 1946, had been
1272 destroyed; and therefore, he could not furnish the information which I had requested.

Q. Your information related to what is in the complaint, red lead, litharge?

A. The information related to red lead, litharge, contracts, and the sale thereof in the City of St. Louis.

Q. When was the subpoena served on you, Mr. Kolb, that is Exhibit No. 822?

A. July 17, 1946. That is the date I wrote to the Hammond office and to the other offices.

1273 Mr. Duncan: Nothing further.

Mr. Wright: No further questions.

Trial Examiner Norwood: Thank you, Mr. Kolb.

Mr. Wright: I would like to recall Mr. Sprague to the stand, please.

Trial Examiner Norwood: All right.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Wright.

Q. Mr. Sprague, do you recall a conversation with Mr. Robert Dunn of the Federal Trade Commission on or about May 28, 1943?

Mr. Duncan: I object, your Honor.

Trial Examiner Norwood: What ground?

Mr. Duncan: It is a leading question.

Trial Examiner Norwood: I think he may lead this witness.

Mr. Duncan: O. K.

Trial Examiner Norwood: It is not a case where the attorney asking the questions might influence the witness into following his thought.

A. I think I had—

Trial Examiner Norwood: Objection overruled.

A. (Continuing)—more than one conversation with
1274 Mr. Dunn, but I do not recall the date.

By Mr. Wright:

Q. Do you recall having conversations with him in approximately that period of time?

A. No, sir; I cannot allocate the date in my mind or an approximation thereof, except that it was prior to the time that Mr. Reels came to our office.

Q. Do you recall when you conversed with Mr. Dunn, you gave him a statement of the zones and differentials applicable thereto applying to the quotations on white lead and oil by the Glidden Company?

Mr. Duncan: Objection, your Honor.

Trial Examiner Norwood: On what ground?

Mr. Duncan: It is immaterial and irrelevant.

Mr. DuBose: I object further on the ground that it is apparently an attempt to impeach his own witness.

Mr. Wright: Your Honor, it is not an attempt to impeach my own witness. I am laying the groundwork for refreshing his memory.

Trial Examiner Norwood: I think counsel may do that. Objection overruled.

By Mr. Wright:

Q. Mr. Sprague, I show you a photostatic copy of Commission's Exhibit 593, which is in evidence, as a statement by the Glidden Company—

1275 Mr. DuBose: What page of the record?

Mr. Wright: 285, I believe is the page of the record.

Mr. Duncan: I object to the part of the question where he says it is a statement of the Glidden Company. I think the document speaks for itself what it is.

Trial Examiner Norwood: He may describe it in his question to the witness.

Mr. Duncan: If it is an incorrect description, I think we have a right to object.

Trial Examiner Norwood: Yes, if he is assuming something that is not in evidence.

Mr. Dixon: 783 of the record, identified at page 285.

Mr. Wright: I will withdraw the question and start over.

By Mr. Wright:

Q. I show you a photostatic copy of Commission's Exhibit 593 and quote from the transcript at page 285, a statement by Mr. Duncan: "In behalf of the Glidden Company,

it is further stated that Commission's Exhibit No. 593 for identification is a definition of the so-called power and differential territories which were prepared by the Glidden Company on or about October 10, 1941. That is, that particular exhibit was prepared by the Glidden Com-
1276 pany." Does that document refresh your recollection as to the geographical zones and territories and the differentiations applicable thereto which were quoted by the Glidden Company during the period of 1941 and 1942?

A. My memory needs no refreshment with regard to this.

Q. Well, Mr. Sprague, I understand your testimony this morning that you did not recall the geographical zones and territories applicable to those quotations in 1942.

A. You are quite mistaken, Mr. Wright. You asked me this morning regarding the geographical zones and territories in prices relating to dry white lead in 1942. This has nothing to do with dry white lead at any time.

Q. I recall your testimony prior to our delving into the dry white lead regarding the method which was employed or the terms and quotations of sale which were employed by the Glidden Company in 1942, with reference to white lead in oil.

Mr. DuBose: I object to that question on the ground that it is argumentative.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. It is my recollection of your testimony that you did not recall those geographical zones and differentials. I will stand corrected if you say you do.

A. I will correct you by saying that I have no
1277 recollection that you asked me this morning at any time anything about zones relating to white lead in oil. The record would indicate what your question was and I will be glad to correct my answer if I made a mistake.

Q. Commission's Exhibit 593, then, is a statement by the Glidden Company of the zones and differentials which applied on that date. Do you recall over what period of time prior to the fall of 1941 those particular zones and differentials were included in the quotations of the Glidden Company?

A. Do you mean now for white lead in oil?

Q. White lead in oil or for any other products for which those zones were applicable.

Mr. Duncan: I object to the question because it is—he applies it to everything. He should confine it—I object to the question on the ground that he doesn't confine it to white lead and oil, he includes everything else.

Mr. Wright: To which those zones applied.

Trial Examiner Norwood: Objection overruled.

A. Repeat your question, please.

By Mr. Wright:

Q. Will you state over what period of time prior to 1941 those zones and differentials applicable thereto were quoted by the Glidden Company in selling white lead in oil?

A. No, sir; I do not know what period of time prior to October 10, 1941—just a minute. I recognize this
1278 as a copy of a sheet that was part of a Glidden Pain Division sales bulletin or price bulletin which was effective October 10, 1941, or in effect on that date. I cannot tell you whether it was in effect prior to that date or not.

Q. Do I understand your statement that you recall having seen that, the original of that particular document before?

A. If this is the document that I gave to Mr. Dunn, I certainly did see it before, and I probably have seen this before.

Q. Well now, will you—withdraw that. Do I understand your testimony then that you do not know over what period of time prior to 1941 the zones set forth and the differentials set forth in that document were quoted by Glidden?

A. That is correct.

Q. Do you recall the zones and differentials which were in effect in June of 1935, applicable to white lead in oil?

A. No, sir; I do not.

Q. Can you state whether there were at that date, June of 1935, any differentials on account of the point of delivery as to white lead in oil?

A. Yes, whatever differentials the competition provided were in existence.

Q. Just a minute, just a minute. I asked you if you recalled whether there were any differentials.

A. In 1935?

1279 Q. In June of 1935.

A. On white lead in oil?

Q. Yes, sir.

A. I think there were.

Q. Do you recall what those differentials were?

A. I do not.

Q. How about in 1934, January 1, 1934, were such differentials then quoted by Glidden?

A. Let's see, January 1, 1934.

Q. Geographical differences.

Mr. Duncan: Your Honor, I would like to object to the question along the same line raised before. The Robinson-Patman Act didn't come into effect until June of 1936.

Trial Examiner Norwood: Objection overruled.

A. I am not certain, but I doubt if there were differentials quoted in January of 1934, in this form. It seems to me white lead in oil was sold at that time on freight equalization point adjustments.

Q. Will you explain freight equalization point adjustments?

Mr. Duncan: I object, your Honor. I don't believe this witness has set himself up as an expert on freight rates.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: I would like to object on the ground that I believe it is irrelevant to this proceedings. I don't
1280 believe there is anything in the amended complaint that deals with that subject.

Trial Examiner Norwood: Same ruling.

A. As I recall, the Glidden Company first sold white lead in oil around 1920. I was not in charge of it, nor directly concerned with it, but I was in the paint end of the business at that time. My recollection is that the price program—the pricing schedules that the Glidden Company adopted were taken bodily from the practices of the National Lead Company, and I believe that the problem of pricing Glidden's white lead in oil had to be solved around the competitive custom of making deliveries of white lead in oil from numerous local warehouse points, and since the Glidden Company was attempting to place white lead in oil in the hands of this sales organization as a selling item, they had to provide some means of pricing it.

As rapidly as knowledge could be acquired concerning these competitive warehouse points, then Glidden, to compete, had to price its product from wherever it was shipped on the basis that would equalize the freight to the buyer from the nearest competitive warehouse point. That is what I meant.

Q. Your Honor—

A. Just a minute. That is what I meant by the term "freight equalization point method."

1281 Mr. DuBose: Could we have the answer read?

Trial Examiner Norwood: Yes.

(Last answer read.)

By Mr. Wright:

Q. Then, do I understand that back in that time, around 1920, there were differentials or warehouse points which took different prices?

A. The pricing of white lead in oil for Glidden was based—had to be based on a plan that would cost the buyer no more than buying directly than otherwise.

Q. Just a minute. I am not interested right now in why. What I want to know is, if you know, how the pricing system or the quotation of prices of white lead in oil by Glidden in that period was made. Was it different delivered prices to various geographical locations by name? You spoke of warehouse points or differential points. Was there a different price applicable to each of various cities?

Mr. Duncan: I object, your Honor; it is immaterial and irrelevant to this case.

Trial Examiner Norwood: What do you say?

Mr. Wright: Your Honor, it is relevant. What I am trying to do is elicit from the witness a statement of just how the Glidden Company made its quotations of lead in that period, to clarify his previous answer.

Trial Examiner Norwood: Read the question.

1282 Mr. Welch: I would like to make this observation, if I may. This case, according to the complaint, revolves about a zone system and not differential points.

Mr. DuBose: That was my point before, your Honor, on that same question. I don't see how it is relevant to this proceeding to go into the history of whatever system they might have had prior to the zone system which is the only so-called system mentioned in the amended complaint.

Trial Examiner Norwood: Now, let's have the question.

(Last question read.)

Trial Examiner Norwood: Objection overruled.

Answer the question.

A. I can't respond in detail what Mr. Wright's question requires. I gave my general impression of what was done in those early years. It would be necessary to get—to find

someone who was handling sales back in those years to be precise in the answer he wants.

Q. Is there anyone now with the Glidden Company who has any better knowledge than yourself of the methods of quoting prices on lead pigments?

A. We are not talking about lead pigments in this question. I think I am fairly well informed on the lead pigment phase. But when it comes to the white lead in oil, as I explained this morning, at no time have I been in
1283 charge of the sales or responsible for the sales of the large bulk of that commodity which was sold by Glidden which was sold through the paint division of the company.

Q. You spoke of the method of quoting to warehouse points back in the 1920's. I call your attention now to the method of quoting as set forth in Commission's Exhibit 593. Can you state when Glidden changed its method of quoting from that employed in the 1920's to that shown in the record to have been employed in 1941?

A. Yes. As soon as Glidden could learn accurately of its competitors' condition.

Trial Examiner Norwood: When was that?

The Witness: It would be necessary to review the sales bulletins to answer that.

By Mr. Wright:

Q. Would it be your testimony then that whenever your competitors adopted a zone system such as is outlined in Commission's Exhibit 593, that Glidden, at that same time—

Mr. DuBose: I object to the question on the ground that there is no proof in this case that any competitors ever adopted any system of any sort.

Trial Examiner Norwood: Read that question, please.

(Question read.)

Trial Examiner Norwood: I don't think he is as-
1284 suming anything there. He is asking if that is a fact.

Mr. DuBose: He said any of the competitors. If he wants to amend that by saying any one of your competitors.

Trial Examiner Norwood: If he knows that, he may tell us that.

Mr. DuBose: My objection is that there was no proof in this case of that.

Trial Examiner Norwood: He hasn't assumed that in his question. He is asking the witness—

Mr. Wright: I meant in the use of my word adopted, adopted individually rather than by collusion. I wasn't attempting to have this witness establish the fact that there was a conspiracy to adopt that.

Trial Examiner Norwood: I will overrule the objection. You may answer the question.

I beg counsel's pardon, there is an assumption there. The objection is sustained.

By Mr. Wright:

Q. Do I understand your testimony, Mr. Sprague, that when your competitors began selling on such a zone system which is outlined in Commission's Exhibit 593, that Glidden, on or about the same time, also sold on such a system?

Mr. Duncan: I object, your Honor. Again, I say it is immaterial and irrelevant.

Trial Examiner Norwood: Read the question.

1285 (Last question read.)

Trial Examiner Norwood: Answer the question, objection overruled.

A. Glidden Company, to my knowledge, has never sold a system of anybody's. They were obliged to meet competition of its principal competitors in the industry. As you know, this industry is not one of a group of equalized competitors. There are one or two large ones and the rest are small.

By Mr. Wright:

Q. Are you referring to the National Lead Company?

Mr. DuBose: I object to that; leading question, if your Honor please.

Trial Examiner Norwood: Objection overruled.

A. National Lead Company's cost of white lead in oil to consumers—

Q. Just a minute.

Mr. DuBose: I object to that and move to strike out the answer. This witness is certainly no expert, hasn't established himself as an expert in the lead industry. He is testifying about another company, a co-respondent in this case, and I move the entire answer be stricken.

Trial Examiner Norwood: Read the answer.

Mr. Wright: I agree with the motion that the answer be stricken. I don't think it was responsive.

Trial Examiner Norwood: The motion is allowed,

1286 by agreement.

By Mr. Wright:

Q. You referred, Mr. Sprague, to meeting your competitors—principal competitors. Were you referring then to the National Lead Company?

A. Yes, sir.

Q. Mr. Sprague, I show you Commission's Exhibits 810, A and B, C and D. Were you in the room when Mr. Kolb testified regarding these documents?

A. Yes, sir.

Q. Do you recall his statement that those prices were applicable to a central or base zone?

A. Yes, sir; I do.

Mr. Duncan: I object. Just a minute; I believe the record reads base territory and not base zone. We can later check the record.

Mr. Wright: I am willing to accept that correction, base territory.

Trial Examiner Norwood: Yes.

Mr. Duncan: I do object to the question on another ground, your Honor, and that is that apparently by this witness, he is attempting to impeach the veracity of his earlier witness, Mr. Kolb. I don't know, but I assume that.

Mr. Wright: Your Honor, I assume that on an objection of Mr. Duncan shortly prior to our adjournment, 1287 he refused to permit any question regarding these price cards because he stated the cards themselves were the best evidence.

Mr. Duncan: That is right.

Mr. Wright: Now, the question I asked before the adjournment to which you sustained an objection related to information which was not on these cards, which now appears in the record from the exhibits themselves. It is certainly relevant to question this witness about what these cards are, what they are applicable to, the extent to which they were used.

Trial Examiner Norwood: You framed your previous question about which we had the controversy on what the cards showed.

Now, if there is any other information not on the cards respecting the same matter that is covered by the card, you may—you are not limited at all in bringing that out.

Read the question and answer.

(Last question and answer read.)

Mr. Duncan: I objected first to the question containing the term base zone.

Mr. Dixon: That was corrected by consent.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. With reference to Commission's Exhibit 810-D, 1288 which is dated January 26, 1942, will you state the geographical areas of that base territory to which that card applied?

A. This card is an announcement of current market prepared for the convenience of customers and subject to confirmation. It presumably represents the price at which Euston dry white lead would be sold and confirmed on January 26, 1942, and it would cover deliveries at any point where the Euston Lead Company confirmed an order for delivery to.

Q. Well now, you heard Mr. Kolb refer to a central or a base territory with reference to those cards. They have been identified as applicable to that territory by Mr. Kolb. My question was: What is that territory, what is the geographical extent of it?

A. I testified this morning, in answer to a similar question, that I could not recall whether there was any difference, current difference in prices of the Euston dry white lead for zones—by territories, particularly with reference to certain states that you mentioned and to California.

As far as I can recall, this price would apply—this card would apply to a sale confirmed on this date for delivery anywhere outside California.

Q. Just a moment, I asked if you could describe the geographical territory. I understand your answer to be that you cannot describe that geographical territory 1289 which Mr. Kolb stated that card was applicable to?

A. That is correct.

Q. Can you give us any rough approximation of that geographical area? Would it, for instance—

A. If it applies to any territory at all, my impression is it would cover any part of the United States other than the Pacific coast states.

Q. Was there any differential at that time which applied to prices on the Pacific coast?

A. Whatever differential competition established would govern.

Q. I didn't ask you—

Mr. Wright: I move to strike that answer as not responsive.

Mr. DuBose: I maintain that is a factual answer.

Trial Examiner Norwood: The motion is allowed beginning with the words "whatever differential".

By Mr. Wright:

Q. My question was, do you know if there was a differential at that time?

A. I testified before, I cannot recall.

Q. Now, would your testimony be to the same effect as to the other documents, Commission's Exhibits A, B and C?

Mr. DuBose: What do you mean the same; the territories?

1290 Mr. Wright: Can you describe the geographical territories to which those cards apply?

The Witness: No, sir; I don't think any apply.

By Mr. Wright:

Q. At any time?

A. Unless it would be the Pacific coast.

Q. Now, I show you Commission's Exhibits 810-E, F, G, H, I and J, which purport to be price cards of the Glidden Company covering red lead, litharge, and orange mineral. Can you state whether there were any geographical—what the geographical territories were to which those cards applied?

A. These cards were made for the convenience of customers showing prices subject to confirmation.

Q. Just a minute. I asked you if you could recall the geographical territory to which those cards applied?

A. I replied to you—I will repeat the reply if you desire. These prices are subject to confirmation and they were intended to apply to the central or middle western and eastern areas of the United States.

Q. Are those in less than carload quantities?

A. They are in less than carload quantities.

Q. Do you know whether, on the dates of those cards, there was a differential added for delivery in less than carload lots of these products to the southern part of

1291 the United States, Alabama, Georgia, Tennessee, South Carolina?

A. These cards do not show the current prices effective outside of the middle country territory.

Q. Were there other prices that were effective?

A. Outside—

Trial Examiner Norwood: Wait a minute, let him answer.

Mr. Duncan: Let him finish his answer.

A. (Continuing.) Outside of that area, prices were higher as competition required.

Mr. Wright: I move that the last three words of that answer be stricken.

Trial Examiner Norwood: Motion allowed.

Mr. DuBose: Your Honor, I submit that that is a factual answer.

Trial Examiner Norwood: I think that he may answer more definitely.

Mr. Wright: The question is if there were differentials. I submit that is not an answer.

Trial Examiner Norwood: Counsel may bring that out by this witness or any other witness, but I think this counsel has a right to direct answers to this witness without argument.

By Mr. Wright:

Q. I call your attention to the note on Commis-
1292 sion's Exhibit 810-I, car lot prices quoted on inquiry.

In quoting prices in car lot quantities of dry red lead and litharge, did the Glidden Company in that period covered by that card quote prices on the basis of the price of pig lead, plus the differential?

A. If any prices were quoted on carload lots during that period, Glidden would quote a price arrived at by adding a figure in cents per pound to a governing pig lead market figure as agreed upon with the buyer.

Q. Where would the Glidden Company secure that governing pig lead market figure?

Mr. DuBose: I object to that, your Honor please, on the ground it is irrelevant and immaterial.

Trial Examiner Norwood: Overruled.

A. Governing lead market on any such sale would be determined as agreed upon with the buyer, usually the published quotations for coloring lead at New York as appearing in the American Metal Market or the Daily Metal Reporter or the Engineering and Mine Journal as having been in effect upon the governing date, or it might be the St. Louis lead market established in a similar manner.

It might have been the average lead market over a period of time agreed upon with the buyer. It might have been a future date agreed upon with the buyer.

Q. Can you state with reference to delivery of dry
1293 red lead and litharge in carload quantities whether there was a similar central territory, or base territory, in which the lowest delivered prices applicable with a higher priced territory?

A. None is established by Glidden. Whatever competition had would govern in those cases.

Q. You did not quote or offer a differential above the central area price for delivery, say, to the Pacific coast on red lead and litharge?

A. Now, you asked me did we—what was that?

Q. Did you quote a higher price for delivery to the Pacific coast than for delivery in your central area?

Mr. Duncan: I object.

A. I do not recall that there was any difference quoted in the Pacific coast.

Q. Was a difference quoted for delivery to any other part of the country that you recall, simply on account of the man's location?

A. No, sir; prices or differentials were quoted on the competition that existed.

Mr. Wright: I move to strike everything after "No, sir."

Trial Examiner Norwood: Motion allowed.

The Witness: I beg your pardon, the answer to the question is incorrect without the rest of my answer.

Mr. Duncan: I move to have it stay in, your Honor.

1294 Trial Examiner Norwood: Read the question and I will ask you to make the correct answer.

(Last question read.)

A. The answer is no.

Mr. Wright: May we have a short recess.

Trial Examiner Norwood: A short recess may be taken.

(A short recess was had.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Sprague, I show you a group of exhibits identified as 811 through 821 which are contracts entered into by the Euston Lead Company Division of Glidden and various purchasers of dry white lead in St. Louis, all of them apparently during the year 1941. I call your attention to the fact that that contract is a printed form

which is filled in in the appropriate spaces. Can you state how long—over what period of time prior to 1941 contracts in that form were entered into by Glidden with purchasers of dry white lead?

A. No, sir; I can't. This form, I believe, has been modified some from time to time.

Q. Can you state when it was modified?

A. No.

Q. How often has it been modified?

A. I couldn't state how often it has been modi-
1295 fied, it seems to me this form or essentially this form was used as far back as 1930.

Mr. Duncan: Your Honor, I object to that last part of the answer, "What seems to be," and ask it go out of the record. Either it was or it wasn't, and this witness either knows or doesn't know.

Trial Examiner Norwood: You may question him further about that.

By Mr. Wright:

Q. Were printed form contracts in use back as far as 1930?

A. Yes, sir.

Q. Were any significant changes made in those contracts between 1930 and 1935?

A. What do you mean by significant changes?

Q. Well, I mean any changes in the form of the contract as to the requirements on delivery and shipments, terms of sale?

A. I don't think so. Not what I would regard as significant.

Q. Has the Glidden Company used printed form contracts in the sale of red lead and litharge?

A. Yes, sir.

Q. Over how long a period of time have such printed form of contracts been used in the sale of those products?

A. I don't know. Many years.

1296 Q. How do the contracts on red lead and litharge —the form contracts, differ from those on dry white lead as shown by Commission's Exhibit 811?

A. There are many differences because the selling practices relating to carloads of white lead and less carloads were sufficiently similar to enable them to be covered on one contract. That wasn't possible in the case of red lead and litharge.

Q. In selling red lead in oil and dry red lead and dry white lead and litharge in steel kegs and cans of a hundred pounds, 50 pounds, 25 pounds, 12 and a half pounds, and in cans of five pounds and one pound, does the Glidden Company quote the same terms and conditions of sale as it does on white lead in oil in similar containers?

Mr. Duncan: I object, your Honor. The reason I object is this: He puts it in the present tense, and we are confined in this amended complaint to a certain period which does not include the present.

Mr. Wright: Your Honor, I am trying to establish the basis of present methods so that it can be traced back and we can get an intelligent picture.

Trial Examiner Norwood: I think he may answer.

A. Your question was as to the present conditions?

By Mr. Wright:

Q. Yes, sir.

1297 A. I cannot answer that.

Q. Can you answer it, say, on the basis of practices in 1942?

A. No, because the sale of those products which you have included in your question in those size packages were a part of the paint activities of the company in the main. To make a correct answer to that rather all-inclusive question, I would have to say that I can't do it.

Q. Mr. Sprague, did you represent the Glidden Company in the Lead Industries Association from time to time?

A. Yes, I represented the Metals Refining Company and the Eustone Lead Company more directly than Glidden because our activities were largely identified in those two directions.

Q. Over what period of time did you represent the Metals Refining and Euston Divisions of Glidden in the lead industries association?

A. Quite a number of years, beginning, I believe, during the period of the NRA activities.

Q. Does the Glidden Company, the Metal Refining and Euston Lead Divisions of Glidden report statistics on production inventories and shipments of pigments to the Lead Industries Association?

Mr. Duncan: I object, it is immaterial and irrelevant in this case, your Honor.

1298 Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: I didn't understand that, will you read it a little slower?

(The reporter again read the question.)

Trial Examiner Norwood: Are you speaking generally or of the present time?

Mr. Wright: At the present time.

Mr. Duncan: I object.

Trial Examiner Norwood: He is not a—

Mr. Wright: He is a vice-president and I am asking if the Glidden Company reports those statistics.

Trial Examiner Norwood: Let him answer; objection overruled.

A. Yes, sir.

Trial Examiner Norwood: I am receiving these questions about present practices subject to connection.

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Because they are not to be included as any evidence whatever of the charges unless they are connected up.

Mr. Wright: I appreciate that, your Honor.

Mr. Welch: I would like to observe for the record that there is no charge whatever that the activities of the various respondents here in separately reporting in-
1299 ventories, production inventory and pigment shipments as an illegal practice.

Mr. Wright: I am sure it will appear from questions which are to follow that the information which I am seeking to obtain is relevant and material.

Trial Examiner Norwood: I will let it in subject to connection. Objection overruled.

By Mr. Wright:

Q. I believe the last question was on what time basis are such statistics reported?

A. Well, the statistics will show that. I do not recall.

Q. Do they report them monthly, do you recall?

A. No, I think not. I think they are annual.

Q. Over what period of time has the Glidden Company reported such statistics to the Lead Industries Association?

Mr. Duncan: I object, your Honor, on the ground that it is immaterial and irrelevant, and I would like to have a general objection then to each question that contains the same line of inquiry, rather than to have to interrupt all the time.

Mr. DuBose: I think all Respondents would like to join in that objection.

Trial Examiner Norwood: You may have an objection to this entire line. Read the question.

(Last question read.)

1300 Trial Examiner Norwood: Objection overruled.

A. That can be shown in the reports of the Association. I do not recall.

By Mr. Wright:

Q. Does it go back over a considerable period of years, do you recall?

A. Several years, yes. I think they started reporting at the same time to the American Bureau of Metal Statistics and the Bureau of Census in the Lead Industries Association.

Q. Would that be around 1932?

A. I can't recall.

Q. Does the Glidden Company receive from the Lead Industries Association statistics on the total production of lead pigments and total shipments of lead pigments by those who report to the institution?

A. They receive the published statistical reports; and whatever they contain, Glidden gets.

Q. Do those reports show the total shipments?

Mr. DuBose: I object, your Honor, on the ground that the best evidence is the reports themselves. We had in New York, the Lead Industries Association secretary there and he brought all records that were called for, and I submit that this indirect method violates the best evidence rule.

Trial Examiner Norwood: Did this evidence go
1301 to written reports?

Mr. Wright: I am inquiring generally about the type of statistics which the Glidden Company furnished to the Lead Industries Association and about the type of statistics which the Lead Industries Association furnished back to the Glidden Company; and I believe that is relevant and material and competent.

Trial Examiner Norwood: Well, I believe I would ask it then, in that way, and not base it on some sort of report which may or may not have been in writing.

Mr. Wright: May I have the question again?

(Last question read.)

Trial Examiner Norwood: Were those reports in writing?

The Witness: To the Lead Industries Association?

Trial Examiner Norwood: Yes.

The Witness: Certainly.

Mr. DuBose: And from the Lead Industries Association—

The Witness: My memory is a little fresher now, but it has been a long time since I was doing that; but I believe the reports were received from the Lead Industries monthly on the production and stocks and shipments of those items that are included in the Lead Industries scope.

By Mr. Wright:

1302 Q. That is total production and shipments for the industry that you received from Lead Industries?

A. Yes, sir.

Q. Are you able by comparing the total production inventories and shipments to your own inventories and shipments and production, to ascertain the proportion of the production inventories and shipments by the Glidden Company to the total of the industry?

Mr. DuBose: I object to that, if your Honor please, on the ground that these reports speak for themselves and they shouldn't have that presumptive, rather vague testimony.

Trial Examiner Norwood: I think he may show the general nature of these reports. He is not giving any figures here. He is not giving any percentages here which, of course, the reports would contain.

Mr. Wright: I am trying to lay a groundwork for this witness' knowledge.

Trial Examiner Norwood: I think he may ask that.

Mr. DuBose: I submit that his knowledge is not the best evidence.

Trial Examiner Norwood: He may state what the reports generally show.

Objection overruled.

1303 Trial Examiner Norwood: The reports were of such a nature that these percentages could be ascertained, is that right?

The Witness: If the basic reports were accurate, sure.

Mr. DuBose: I don't think there is any question on that, if each individual company knows its own production and gets the total, they can divide it and get a percentage

and get their own particular percentage. I think we will concede that, but I don't think it is material.

Trial Examiner Norwood: Well—

Mr. DuBose: Their own particular percentage. The testimony is here that there was no—testimony in New York said it was only to the lead industry and no other company got its report nor did it go to any other company.

Mr. Wright: That testimony related to National Lead. Now we are taking up the question of Glidden.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Are you familiar with the position, the relative position of the Glidden Company to the rest of the industry in shipments of white lead in oil during the year 1943?

A. The relative position, yes. The relative position of the Glidden Company to the principal producers was that of a minor factor. The position of Glidden with re-
1304 spect to the other producers, we have no knowledge.

Q. Well, you have already stated that you received statistics showing the shipments by the industry as a whole of white lead in oil?

A. Yes.

Q. Can you state on a percentage basis the relation of Glidden shipments of white lead in oil to those of the entire industry for 1942?

A. No, I cannot.

Q. Can you make any estimation of the relative position?

A. I can guess at it.

Mr. Duncan: We object to any guessing.

Mr. DuBose: I object to a guess.

Trial Examiner Norwood: Sustained.

By Mr. Wright:

Q. Do you have an recollection of the shipments of white lead in oil by Glidden during 1943 on a tonnage basis, in round numbers?

A. No, sir.

Q. Can you state the position of Glidden relative to the entire industry on dry white lead during the year 1943?

A. No, sir; I cannot.

Q. Is Glidden a large factor in dry white lead as compared to the rest of the industry?

A. It was a larger factor in dry white lead than it
1305 was in the white lead in oil in a percentage factor.

Q. Do I understand your testimony that you cannot recall the shipments on a tonnage basis of dry white lead during 1943?

A. No, I cannot; I don't have those statistics in my mind at all.

Q. Can you state the relative position of Glidden to the rest of the industry during 1943 in shipments of dry red lead?

A. I can guess at it.

Mr. DuBose: I object to that.

By Mr. Wright:

Q. What would be the basis of your guess?

Mr. DuBose: I object to any guesses of the witness.

Trial Examiner Norwood: The question is—if he can show that he can make a reasonable estimate, I will let him make it.

Mr. DuBose: He said a guess. That is why I objected.

Trial Examiner Norwood: He is asking what the witness meant by a guess. Objection overruled.

Mr. Duncan: Your Honor, the objection by Mr. DuBose, I understand, is for all respondents. It seems to me this line of inquiry suggests a disclosure of information that might be confidential and certainly shouldn't be given
1306 to competitors. On that score alone, I don't know why this witness should be advised by the Examiner to answer the question.

If he has knowledge of any specific percentages, I submit, that your Honor is compelling the witness—

Trial Examiner Norwood: 1943. Do you think that would be injurious to your client?

Mr. Duncan: It might be.

Mr. Wright: It has come up before in the record on that point. We have already in the evidence a number of exhibits which were given by officials of the respondents showing their exact tonnages and their relative position on a percentage basis on white lead and oil in 1940, 1941, 1942. At the time those were given voluntarily for the purpose of this proceeding, there was no question made of their being confidential in anyway and there was no objection to them.

Mr. DuBose: That was white lead in oil only.

Mr. Duncan: That was with reference to the complaint which excluded red lead and litharge and so forth.

Mr. Wright: Now the question goes to white lead in addition.

Mr. Duncan: I believe that your objection is well taken.

Trial Examiner Norwood: The pending question is: On what would your guess be based?

1307 I will overrule the objection and ask the witness to answer that question.

Mr. Duncan: Note an exception.

A. I carry in my mind irregular recollections of percentages of the Glidden Company's sales and shipments with regard to the entire industry, but I can't pull them out for you. There is no objection from the standpoint of the Glidden Company to giving you some figures, but I didn't come here prepared to answer questions of that sort. I can give you a general estimate which was about, on red lead in oil, perhaps six or 7 per cent of the total. That is my estimate. Red lead and litharge would be even less than that.

The main thing to me and the only thing that dominated my thinking was that Glidden was an inconspicuous factor in this industry. Now, when you ask me what was the percentage and what was the tonnage, I can only answer you that I do not recall.

Q. Now, your estimate upon the basis of percentage figures which have stuck in your mind was for 1943?

A. Yes.

Q. Was Glidden in approximately that same relative position back through 1940 and 1937?

A. I can recall that there were major ups and downs during the period that Glidden was engaged in the business. Just when they occurred, I don't remember. I think

1308 it is safe to say that Glidden never had more than eight or nine per cent of white lead in oil business at anytime.

Q. How about dry white lead?

A. There the percentage was larger, perhaps double.

Q. Does the Glidden Company maintain records from which it could be ascertained exactly the relative position over the period from 1935 to 1943?

A. Glidden's records on sales and shipments are usually destroyed in about two years, but statistical data of that kind could be obtained probably better from the agencies to which the reports were made and who published the aggregates that it could be obtained from Glidden.

Q. Mr. Sprague, with regard to freight rates, do you recall whether the commodity classifications and the rates themselves are the same on red lead and litharge in bags and barrels as on dry white lead?

Mr. Duncan: I object, your Honor, for the same reason announced this morning.

Trial Examiner Norwood: I think counsel has a general objection to this line, to everything that relates to freight.

Mr. Duncan: That is right.

Trial Examiner Norwood: Objection overruled.

A. I do not recall freight rates of any kind, on anything, but I do not believe Glidden shipped any red lead or litharge in bags.

1309

Q. It did ship such commodities in barrels, however?

A. The term barrel, as I understand it, refers to a wooden package made with staffs and so on. Very rarely were such things used.

Q. Were steel kegs or barrels used?

A. Yes, steel.

Trial Examiner Norwood: Doesn't barrels in your industry refer to a certain number of sacks, or a certain number of pounds, as a unit?

The Witness: No, it is a description of a type of container.

Trial Examiner Norwood: Barrel really means barrel?

The Witness: Yes, sir, that is right.

Mr. Wright: No further questions.

Trial Examiner Norwood: You may examine him.

Mr. Duncan: No questions, your Honor.

Trial Examiner Norwood: Is there anything else this afternoon?

Mr. Wright: No, sir. Our next witness will be tomorrow morning.

Trial Examiner Norwood: Then we will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:26 p. m. a recess was taken until 10:00 a. m., Thursday, July 25, 1946.)

1310 Room 410,
Federal Building,
Cleveland, Ohio,
July 25, 1946.

Met, pursuant to adjournment at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch (Davies, Richberg, Beebe, Busick & Richardson, 15th Street N. W., Washington, D. C.) and T. J. McDowell (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.

Harry E. Gardiner (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, New York), for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.

Eugene Z. DuBose (Alexander & Green, 120 Broadway, New York, New York), for the National Lead Company.

1310A John A. Duncon (1649 Union Commerce Building, Cleveland, Ohio), for the Glidden Company.

1311 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment yesterday, hearing in Docket 5253 convened at 10 o'clock a. m., Room 410 Federal Building, Cleveland, Ohio, July 25, 1946.

Appearances are as follows: Joseph Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch and T. J. McDowell, Attorneys for Sherwin-Williams Company.

Henry E. Gardiner, Attorney for Anaconda Copper Min-

ing Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.

Eugene Z. DuBose, Attorney for the National Lead Company.

John A. Duncan, Attorney for the Glidden Company.

Call your witness.

Mr. Wright: Call Mr. Coolidge.

SOLLACE B. COOLIDGE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Coolidge, will you state your full name and 1312 address for the record, please?

A. Sollace B. Coolidge, Jr., Sherwin-Williams Company, Cleveland, Ohio.

Q. What is your present position with the Sherwin-Williams Company?

A. Vice-president and director.

Q. What are the duties and responsibilities of that position?

A. Largely manufacturing of raw materials.

Q. Your duties in that position—are your duties in that position concerned with lead pigments?

A. Yes, sir.

Q. How long have you been in your present position?

A. A year, approximately.

Q. Will you start at the time of your first employment by Sherwin-Williams and give us an account of your positions and responsibilities?

A. I started in October 24th, and then six months after that, was in the sales of linseed oil and meal. About 1926 I went into pigment sales in Chicago, later on New York; came back to Cleveland about 1929, at which time I was made manager of the auxiliaries department, held that position until December of last year.

Q. You referred to the auxiliaries department. What is that department?

1313 A. It is a manufacturing department of raw materials, primarily pigments, oils, cans.

Q. What lead pigments are presently produced by Sherwin-Williams?

A. White lead carbonate, litharge, red lead.

Q. Where are the factories of Sherwin-Williams located at which these pigments are produced?

A. Chicago.

Q. All manufacturing of lead pigments by Sherwin is at Chicago; is that right?

A. Yes, sir.

Q. Where does the Sherwin-Williams Company obtain the pig lead from which the pigments are produced?

A. Obtain it from practically all suppliers.

Q. Is it obtained in the open market?

A. Yes, sir.

Q. Does the Sherwin-Williams Company solicit business in lead pigments and sell lead pigments throughout the United States?

A. With the exception of the Pacific coast. You are talking of dry pigments, now?

Q. Well, I will confine the question to white lead in oil.

A. Throughout the United States, yes.

Q. Now, as to dry white lead?

A. Dry white lead, not the Pacific coast.

1314 Q. Red lead?

A. The same all the way through on both litharge and red lead; no sales are made on the Pacific coast.

Q. Dry red lead?

A. Litharge and dry red lead.

Q. Is red lead in oil sold throughout the United States?

A. Yes.

Q. Mr. Coolidge, I show you a document marked Commission's Exhibit 594, A and B, which is in evidence in this case. Do you recognize that as a price list of red lead in oil of the Sherwin-Williams Company?

Mr. Welch: Objection. As I recall, we have already stipulated in the record what the document was. My objection is solely that this additional testimony about the document is just surplus because we—

Trial Examiner Norwood: Surplusage?

Mr. Welch: I don't want to characterize it, but it is surplusage.

Mr. Wright: I want to find out from this witness if it recognizes it, and for what it recognizes it.

Trial Examiner Norwood: Let him describe it.

Tell us just what you recognize.

A. It is a list of differentials on white lead in oil and zilo which we sell at various points throughout the country.

Q. Are those differentials on account of the place
1315 where the white lead in oil is to be delivered?

A. Yes, sir.

Q. Now, I call your attention to the statement "lead in zilo price differentials for S-W warehouses and stores." Do you have either a warehouse or store in each of these places?

A. I couldn't answer that question.

Q. Does the Sherwin-Williams Company sell white lead in oil to other cities and towns than those appearing on that list?

A. Yes, sir.

Q. Can you tell me how differentials for delivery to other towns than those appearing on that list are worked out?

A. No differentials are added for the other towns, they pay the freight from these delivery points.

Q. I call your attention to the fact that Washington, D. C., does not appear on this list. Do I understand your answer, then, that a customer of Sherwin-Williams ordering white lead in oil for resale who is located in Washington, D. C., would pay some price with the addition of freight from another point on this list?

A. Yes, sir.

Q. Does that answer hold true, regardless of the quantity in which the order is made?

A. Yes sir.

1316 Q. Can you tell me from what point the customer in Washington, D. C., would pay freight?

A. Probably from Baltimore, where we have a warehouse.

Q. Is it my understanding of your testimony, then, that a purchaser of white lead in oil from Sherwin-Williams, located at any other city than those named on this list at that date would pay an addition of freight from some other point on that list?

Mr. Welch: Objection. The question has been asked and answered; exactly the same question before, and the witness has done his best to explain what the situation is.

Trial Examiner Norwood: I think he may answer that; objection overruled.

A. Will you state your question again?
Mr. Wright: Read the question.
(The reporter read the last question.)
A. Yes, sir.

By Mr. Wright:

Q. Will you tell me, Mr. Coolidge, for over what length of time the differentials and differential points appearing on Commission's Exhibit 594, A and B, has been in effect with the Sherwin-Williams Company?

A. Well, I couldn't say as far as the particular points listed here are concerned; but we have had a similar list of points ever since I have been with the Sherwin-
1317 Williams Company. Whether they correspond with this list over a period of time, I couldn't say, but we have always listed our prices on white lead in oil in this fashion.

Q. In selling red lead in oil and dry white lead and litharge in steel kegs of 50-pound, 25-pound, 12 and a half pounds, and cans of five pounds and one pound, does the Sherwin-Williams Company quote the same differentials and differential points as for white lead in oil?

Mr. Welch: Objection. There is no showing whatever that the Sherwin-Williams Company sells those products in the types of containers or size of containers mentioned in the question. I think the record should first be clarified to show what size containers and what kind of containers they do sell, and then ask the question as to the differentials.

Mr. Wright: Your Honor, there is already in evidence document 662-I, for one thing, which shows that the Sherwin-Williams Company does sell these products in those containers—offers them for sale, rather.

Trial Examiner Norwood: Objection overruled.

Mr. Welch: Mr. Examiner, I would like to point out that the document referred to does not refer to the types of containers mentioned in the question. It does refer to sizes, but as I recall the question, it comprehended several types of containers and I think that in so far as it
1318 does that, the question is improper.

Trial Examiner Norwood: Let me see that exhibit. Read the question, will you please.
(The reporter read the last question.)
Trial Examiner Norwood: Does the Sherwin-Williams

Company sell that product in the containers which the question refers to?

The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled.

The Witness: Yes, they do sell at the same schedule of differential points.

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 662-I. Do the statements appearing thereon, "Consumers' prices, Eastern Zone"—will you explain the term eastern zone, as it appears on that exhibit?

Mr. Welch: If your Honor please, I object to that question. I don't think it is proper for this witness to explain. The exhibit speaks for itself.

Trial Examiner Norwood: Does it describe it?

Mr. Wright: No, it does not.

Trial Examiner Norwood: Objection overruled.

A. If you will notice in our list of differentials here, the Cities or towns with an "E" after them are the eastern zone.

1319 Q. Does eastern zone then describe a territory within which these cities with an "E" on Exhibit 594-I are located?

A. Not necessarily. We sell not by zone, but by cities.

Q. I didn't understand your answer to the first question regarding the meaning of that eastern zone, then.

A. All the cities in the eastern zone which are sold at this price basis are indicated on that sheet by an "E" after the town.

Q. But then not all—as I understand your testimony, then, not all cities which would be located within the territory in which these cities are located would take the eastern zone prices?

A. Exactly.

Mr. DuBose: Mr. Wright, I think the record should be clear; when you said this document, were you referring to 594, A and B?

Mr. Wright: Yes, sir.

By Mr. Wright:

Q. Mr. Coolidge, are you prepared to make a return of a subpoena duces tecum which was served on the Sherwin-Williams Company?

A. Yes, sir; in so far as possible.

Q. Do you have the documents which were called for by Specification 1?

A. Yes, sir; in part. I am not clear as to the 1320 specification. Yes, I have all those in Specification 1.

Q. Do you have the documents called for under Specification 2?

A. We have no contracts on white lead, litharge, or red lead in the City of St. Louis on the dates mentioned.

Mr. Wright: I ask that these documents be identified as Commission's Exhibits 823, A, B, C, D, E, F and G.

(The documents referred to were marked Commission's Exhibits 823-A, 823-B, 823-C, 823-D, 823-E, 823-F and 823-G for identification.)

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 823-A, Mr. Coolidge, and ask you to state what it is.

A. This is a bulletin sent to our sales department covering prices on litharge, red lead, in steel drums of 500 pounds or more, in effect December 30, 1932.

Q. I show you Commission's Exhibit 823-B and ask you to state what that is.

A. This is the same as the previous document, only the date being October 30, 1933.

Q. I show you Commission's Exhibit 823-C and ask you to state what that is.

A. This is the same, only the date being June 29, 1934.

Q. Show you Commission's Exhibit 823-D and 1321 ask you to state what that is.

A. Same, with the exception of the date being September 19, 1935.

Q. Commission's Exhibit 823-E, will you state what that is?

A. The same, except the date is December 21, 1936.

Q. And Commission's Exhibit 823-F, will you state what that is?

A. The same with the exception the date is January 14, 1942.

Q. I show you Commission's Exhibit 823-G and ask you to state what that is.

A. This is a bulletin sent to our sales department covering prices on dry white lead carbonate in effect as of January 28, 1942.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibits 823-A to G, and in that connection state that I understand these are original documents of the Sherwin-Williams Company which they wish to have returned and that the reporter will have the documents photostated and the photostatic copies of same be marked as exhibits in the record, so that the originals may be returned to the Sherwin-Williams Company.

Will that be satisfactory, Mr. Welch?

Mr. Welch: Entirely satisfactory.

Trial Examiner Norwood: Any objection to the
1322 receipt of the documents in evidence?

Mr. Welch: None whatever.

Trial Examiner Norwood: Received as marked, with the understanding that the reporter will have them copied by photographic process and marked in evidence, and the originals be returned to the Sherwin-Williams Company.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 823-A to 823-G, inclusive, were received in evidence.)

Mr. Welch: Mr. Examiner, I want to withdraw the remark that I had no objection. I want to state that I have an objection to 823-A, B, C, D, in so far as their applicability to Count 2 of the complaint is concerned, because they were issued long prior to the enactment of the Robinson-Patman Act.

Trial Examiner Norwood: Yes.

Mr. Wright: Please mark this as Commission's Exhibit No. 824.

(The document referred to was marked Commission's Exhibit 824, for identification.)

Trial Examiner Norwood: The objection to Exhibit 823 is overruled and the exhibits are received as to Count 2. I think I explained that fully. I want to be understood here as simply refusing to place an arbitrary restriction on the legal or logical use that may be made of the exhibits on either count.

1323 If it lawfully or logically appears that they may be used, then they will have their proper and logical value. They are not going to be used for something that would be illogical and unreasonable, as I said yesterday. They will not be used to establish any particular overt act prior to the enactment of the Robinson-Patman Act.

Proceed.

By Mr. Wright:

Q. Mr. Coolidge, I show you a document marked for identification Commission's Exhibit No. 824, and ask you to state what that is?

A. Subpoena to the Sherwin-Williams Company, secretary of the Sherwin-Williams Company.

Q. Is that the subpoena to which you were making return this morning?

A. Yes, sir.

Mr. Wright: I offer Commission's Exhibit 824 in evidence.

Mr. Welch: Objection.

Trial Examiner Norwood: Received.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 824, was received in evidence.)

By Mr. Wright.

Q. Mr. Coolidge, I show you Commission's Exhibit 823-A.

1324 Is that your signature?

A. Yes, sir.

Q. Reproduced there?

A. Yes, sir.

Q. Will you state the geographical areas over which the prices set forth in that exhibit were applicable?

Mr. Welch: Wait just one minute before the witness answers, please.

A. This would apply to all points in the United States, with the exception of the Pacific coast where we did not sell it.

By Mr. Wright:

Q. In other words, in December 30, 1932, the Sherwin-Williams Company was offering red lead and litharge at a flat price in the whole eastern part of the United States, up to the Pacific coast?

A. That is correct.

Q. I call your attention to Commission's Exhibit 823-B, dated October 30, 1933, and ask you to state the geographical areas to which these price quotations were applicable?

A. The same as the preceding one.

Q. I call your attention to Commission's Exhibit 823-C and the statement of geographical differentials on red lead

and litharge contained therein. Are you able to state when Sherwin-Williams made the change in quoting from
1325 that set forth in 823-B, to that set forth in 823-C?

A. I would assume that it was as of June 21, 1934, as there is no intervening bulletin between this and this (indicating).

Q. I call your attention to Commission's Exhibit 823-F, and the geographical differentials set forth thereon. Those appear to be the same as those on 823-C. Can you state whether those differentials—geographical differentials applied continuously from the date of 823-C to the date of 823-F?

A. Yes, sir.

Q. I show you Commission's Exhibit 823-G, and call your attention to the statement, "Pacific coast only," and the price quoted thereunder, which is apparently one-quarter of a cent higher than the price set forth immediately above. Do you recall the states which comprised the Pacific coast area, as referred to on that document?

A. It would be all states west of the Rocky Mountains.

Q. Please state the period of time over which that geographical differential as set forth in that exhibit has been quoted by Sherwin-Williams in offering dry white lead for sale.

A. I don't believe I could answer that question without referring to records.

Q. Do you recall whether such differentials were quoted in 1936?

1326 A. No, sir; I don't.

Q. Does the Sherwin-Williams Company enter into contracts with purchasers of dry white lead covering quarterly requirements?

A. Dry white lead?

Q. Yes.

A. Yes, sir.

Q. Are such contracts on a printed form?

A. Yes, sir.

Q. Over what period of time have such printed form contracts for dry white lead been employed by Sherwin-Williams Company?

A. Ever since I have been with the company; how long before that, I don't know.

Q. Does Sherwin-Williams enter into contracts with purchasers of dry red lead and litharge covering quarterly requirements?

A. No, sir.
Q. Have they ever?
A. Not to my knowledge.
Q. Does the Sherwin-Williams Company generally sell lead pigments in accordance with its published and announced prices and terms of sale?

Mr. Welch: Objection. Your Honor, the record in this case already shows the inspection of thousands of in-
1327 voices. They have all been analyzed and tabulated, and they certainly show what the general practice of the company is, as to whether it does or does not sell according to its published prices, which price list the Commission also has in evidence.

We say that is the best evidence of how the company does business.

Mr. Wright: I submit that while there is a record of thousands of Sherwin-Williams invoices in the record already, that doesn't purport to cover the undoubted millions of invoices that the Sherwin-Williams Company has covering transactions they have entered into over a period of years with which this complaint is concerned.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Trial Examiner Norwood: Overruled, answer the question.

Mr. Welch: Exception.

A. Yes, sir.

By Mr. Wright:

Q. Does Sherwin-Williams Company sell dry red lead and litharge in carload quantities?

A. Yes, sir.

Q. Will you state the method of quoting prices on car-load quantities of dry red lead?

1328 A. It is done on a differential basis over the pig lead market then existing.

Q. Existing at what time?

A. At the time of quotation.

Q. At the time of the quotation?

A. Yes, sir.

Q. Will you explain the expression "Pig lead"? What market?

A. New York pig lead market.

Q. Now, is that an average pig lead market?

A. It could be either one. If it was a spot sale, it would

be quoted on the pig lead market existing at the time of quotation. If it was covering requirements over a period of time, it could be done on either basis, either an average monthly pig lead quotation or on a spot basis.

Q. What quotation is used?

A. Either one.

Q. What quotation for pig lead, American Smelting & Refining Company quotation on pig lead?

A. No, sir; the New York market.

Q. Well, what sources of market information are used to determine?

A. Engineering Mining Journal is the official publication that we use for determining pig lead quotations.

Q. In shipping lead pigments to the customers, 1329 does the Sherwin-Williams Company in all instances pre-pay the freight?

Mr. Welch: Objection. The document is already in evidence to show what the freight practices are and how it is handled. We don't think this witness has been qualified to show familiarity with freight rates.

Trial Examiner Norwood: I think he may tell us if he knows. Counsel may enlarge on this information.

The Witness: Will you read the question again?

Trial Examiner Norwood: Objection overruled. Read the question.

(The reporter read the last question.)

A. You mean by that actually prepaying it?

Q. Yes, sir.

A. We either prepay or allow the freight on the invoice.

Q. When you allow the freight on the invoice, the customer pays the freight?

A. Yes, sir.

Q. And it is deducted from the invoice?

A. Yes, sir.

Q. Do red lead in oil and litharge in steel kegs and cans generally carry the same freight classifications and freight rates as white lead in oil?

A. I couldn't answer that question offhand.

Q. Do dry red lead and litharge in bags and barrels or drums carry the same freight classifications and 1330 freight rates as dry white lead in similar containers?

A. I believe so.

Q. Do you represent the Sherwin-Williams Company in the Lead Industries Association?

A. Exactly what do you mean by representation?

Q. Do you attend the meetings of the Lead Industries Association as a representative of Sherwin-Williams Company?

A. No, sir.

Q. Your answer refers to the present time?

A. Yes, sir.

Q. Have you ever represented Sherwin-Williams Company?

A. Yes, sir; during NRA days.

Q. Over what period of time was that, do you recall?

A. Not exactly; no.

Q. Does the Sherwin-Williams Company furnish statistics to the Lead Industries Association showing production, stocks and shipments of lead pigments?

A. Yes, sir.

Q. On what time basis are those statistics furnished; monthly, annually?

A. Monthly.

Q. Does Sherwin-Williams Company receive from the Lead Industries Association statistics on production, stocks and shipments of lead pigments?

A. In total by the industry, yes.

1331 Q. They show the total of the production, stocks and shipments for the industry?

A. Yes, sir.

Q. Do they show any percentage of the various companies?

A. No, sir.

Q. Are you able to ascertain your position with reference to the remainder of the industry by these statistics supplied to you by the Lead Industries Association?

A. Our percentage of the industry; yes, sir.

Q. Will you state on a percentage basis, as near as you can, the relative position of Sherwin-Williams in the shipment of white lead in oil to the rest of the industry during 1943?

A. Approximately five per cent.

Q. During 1944?

A. Approximately the same.

Q. Has that approximate five per cent position extended over any considerable period of time?

A. It has been around that figure for a great many years.

Q. Can you state the relative position of Sherwin-Wil-

liams on a percentage basis to the rest of the industry in shipments of dry white lead for 1943, say?

Mr. Welch: That is, shipments to customers?

Mr. Wright: Yes, sir.

A. Shipments to customers?

1332 By Mr. Wright:

Q. Yes, sir.

A. Practically nothing, less than one per cent.

Q. Would your answer be the same as to the year 1940?

A. Yes, sir; it would.

Q. Has that less than one per cent relation obtained over any considerable period of time?

A. In normal years, that is true.

Q. Will you state the relative position on a percentage basis as to shipments to customers of dry red lead during 1943?

A. Practically nil.

Q. Has that obtained over any considerable period of time?

A. Yes, sir.

Q. For how many years, would you say?

A. As long as I have been in the business.

Q. With reference to litharge?

A. It would be less than one per cent.

Q. Would that also apply over a great many years, or has it been—

A. Fifteen years, at least.

Q. How about red lead in oil?

A. Practically nil.

Mr. Wright: I have no further questions, your Honor.

1333 Mr. Welch: May we have a recess, your Honor?

Trial Examiner Norwood: Five minutes recess.

(A short recess was taken.)

Trial Examiner Norwood: The witness will resume the stand. Proceed.

Mr. Wright: I have no further questions, your Honor.

Mr. Welch: No questions, your Honor.

Trial Examiner Norwood: The witness is discharged.

(Witness excused.)

Trial Examiner Norwood: Commission's Exhibit 493-A to G, inclusive, the objection is overruled and the exhibit is received in evidence.

(The papers referred to, heretofore marked for identi-

fication COMMISSION'S EXHIBITS 493-A to G, inclusive, were received in evidence.)

Trial Examiner Norwood: Anything further?

Mr. Wright: No, sir; nothing further. I suggest that we adjourn to St. Louis on the 29th.

Trial Examiner Norwood: Anything further counsel wish to take up at this time?

The hearing is now adjourned to reconvene in the City of St. Louis, Missouri, in Room 425 of the U. S. Court House, at 10 o'clock a. m., on the 29th day of July, 1946.

That means the standard time of that zone.

1334 (Whereupon, at 11:45 a. m., July 25, 1946, the hearing in the above-entitled matter was adjourned.)

1335 Room 516, U. S. Court and Custom House, St. Louis, Missouri, July 29, 1946.

Met, pursuant to adjournment, at 10:00 a.m., Central Standard Time.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N. W., Washington, D. C.,) and T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio) attorneys for Sherwin Williams Company.

Henry E. Gardiner, (Chadbourne, Wallace, Parks & Whiteside, 25 Broadway, New York, N. Y.,) attorneys for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

Eugene Z. DuBose and William R. McDermott, (Alexander & Green, 120 Broadway, New York, N. Y.) attorneys for the National Lead Company.

1336 John A. Duncan (1649 Union Commerce Building, Cleveland, Ohio, for the Glidden Company.

1337 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment at Cleveland, Ohio, on July 25, the hearing is now reconvened in Docket 5253, in Room 516 of the U. S. Court and Custom House, St. Louis, Missouri, at ten o'clock a.m., on the 29th day of July, 1946, due notice of change of hearing from Room 425 having been given.

The appearances are as follows:

Joseph Wright and Paul H. Dixon for the Federal Trade Commission.

S. T. Welch and T. J. McDowell for Sherwin Williams Company.

Henry E. Gardiner for Anaconda Copper Mining Company and International Smelting and Refining Company.

Richard Serviss and Edmund P. Wood for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Eugene Z. DuBose and William R. McDermott for National Lead Company.

John A. Duncan for the Glidden Company.

You may proceed, gentlemen.

Mr. Wright: Your Honor, I would like to call Mr. Casey to the stand.

Trial Examiner Norwood: Counsel may remove their coats.

Mr. Duncan: May we have separation of witnesses?

1338 Trial Examiner Norwood: Certainly. Is there somewhere the witnesses may wait outside there? You can excuse the witnesses for an hour, sir. Call your witness.

SYLVESTER R. CASEY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name?
A. Sylvester R. Casey.
Q. Excuse me?
A. Sylvester R. Casey.
Q. What is your occupation, Mr. Casey?

A. Vice-president and general manager of Mound City Paint and Color Company.

Q. Where is the Mound City Paint and Color Company located?

A. 202 South Ninth Street, St. Louis, Missouri.

Q. What is the business of the Mound City Paint and Color Company?

A. Manufacturing paint.

Q. How long has the company been so engaged?

A. Since 1880.

Q. Do the paints manufactured by Mound City contain lead pigments?

1339 A. They do.

Q. Will you state how long a period you have been so employed with the Mound City Paint Company?

A. Since 1920.

Q. Will you please state the geographical areas over which Mound City distributes paint?

A. Well, we distribute east into Indiana, and we distribute to the entire southwest, Missouri, Arkansas, Louisiana, Oklahoma, Texas, Mississippi; that is our general trade area.

Q. Do you market paints in west of St. Louis?

A. Not very much; some.

Q. Do you sell in Omaha, Nebraska?

A. Well, we have and we do spasmodically.

Mr. McDermott: May I ask here that the witness keep his voice up a bit?

Trial Examiner Norwood: Yes, speak a little louder. Let us know if you don't hear.

Q. (By Mr. Wright) Do you endeavor to market paints north of St. Louis?

A. Very little.

Q. Does your answer refer to the present time to the geographical area?

A. No, that has always been.

Q. That has always been the general market area?

A. That is right.

1340 Q. Will you state what products produced by Mound City contain lead pigments?

A. House paints primarily, paste paints.

Q. What lead pigments do those paints contain?

A. Well, they might contain either lead carbonate or lead sulphate.

Q. Do you make a red lead paint?

A. Not very much.
Q. You do make—
A. (Interposing) Some, yes.
Q. From what companies do you purchase lead pigments for use in manufacturing paint?
A. Oh, we purchase from National Lead, Eagle Picher, Houston White Lead.
Q. Are you regularly solicited by all of those companies to purchase lead pigments?
A. Yes.
Q. Are you ever solicited by any other sellers of white lead?
A. Well, we probably have been, but not in the last few years.
Q. Who were those companies, if you recall?
A. Well, one in Chicago—I don't know the name of the company, but a fellow by the name of McGregor runs the company, or operates it.
Q. Can you think of any others?
A. No, I don't right now.
1341 Q. Has the Mound City Company ever entered into contracts with the suppliers of lead pigmen covering their purchases?
A. Oh, yes.
Q. Are any such contracts presently in force?
A. I don't think so.
Q. Do you recall the terms of the contracts which have been entered into?
Mr. DuBose: That is objected to as not the best evidence, if your Honor please. I think the contracts should be produced.
Trial Examiner Norwood: I think he is trying to identify some contracts. You mean you recall the contents of the contract?
Mr. Wright: Your Honor, the witness referred to contracts generally with several producers. I was trying to elicit from him information generally on the provision of the contracts.
Trial Examiner Norwood: Well, you can't do that, but you can show the general nature of these contracts whether they were sealed contracts or something else. I sustain the objection. Proceed.
Q. (By Mr. Wright.) Mr. Casey, can you recall the amount of dry lead, both basic carbonate and basic sulphate, which Mound City purchased during 1943?

A. No. We have about 800 raw materials, and it
1342 would be impossible for any man to remember how much of any item was bought.

Q. Can you give me an approximate figure as to your consumption in any recent year?

A. No, I couldn't without referring to the records.

Q. Do you recall whether it is a substantial amount.

Mr. DuBose: I object to that, if your Honor please, it is too indefinite.

Trial Examiner Norwood: Objection overruled.

The Witness: Will you state your question?

Q. (By Mr. Wright.) Do you recall whether you purchased a substantial amount of dry white lead during 1942?

A. What do you mean by "substantial amount"?

Q. Do you have any idea of the amount?

A. No, I said I didn't have an idea without referring to the records.

Q. You referred to house paint manufactured by Mound City as containing white lead; will you state the formula as closely as you can?

A. You mean the entire formula?

Q. No, the amount of pigment and the amount of vehicle contained in the house paints manufactured by Mound City.

A. Well, we make one house paint that contains 66 per cent of pigment, 34 per cent of liquid. Of that pigment, 60 per cent is white lead, 40 per cent is zinc oxide.

1343 Q. What is the weight in pounds per gallon of that paint?

A. The net weight is 16.9.

Q. Is that the only outside white house paint?

A. That is right.

Q. Over how long a period of years has Mound City produced paint of that formula?

A. Well, they were producing it when I came there and I assume that they have always produced it.

Mr. Duncan: I object and move that the last part of that answer be stricken out as being what he assumed.

Trial Examiner Norwood: You can cross-examine him on that. He may give us an estimate in there about this business that he has been following for a long time. Did you make a motion to strike?

Mr. Duncan: Yes, your Honor. I move that the last

part of the answer, which is based upon the assumption—

Trial Examiner Norwood: (interposing) Read the entire answer.

(Reporter read the last answer.)

Trial Examiner Norwood: Motion allowed. Strike everything beginning with "I assume", the rest of the answer.

1344 Q. Mr. Casey, you referred to a red lead paint. Do you recall the formula of the red lead paint?

A. No, I don't.

Q. Can you give us an approximate number of pounds of lead pigment which would go into a red lead paint?

A. No, I didn't even look that up.

Q. Will you state the relation of the cost of the white lead to the total material costs of the white lead paint produced by Mound City?

A. I don't have those figures. The only figure I have is the number of pounds of lead in a gallon.

Q. Can you state what the material costs of producing a gallon of outside white paint are at the present time?

A. That would be pretty hard to do. Every day you get a market change on some raw material, I mean yesterday the cost was one thing and today it is another. Oil might change or some other pigment.

Q. Can you state what the price of oil was yesterday?

Mr. Welch: I object, Your Honor. I think we are going fairly far astray when we get into the price of oil.

Trial Examiner Norwood: What was that question?

(Reporter read the last question.)

Trial Examiner Norwood: I don't see any purpose of that.

Mr. Wright: Your Honor, I am trying to get a 1345 statement of the witness as to the costs of producing white lead paint and oil is one of the chief ingredients of that paint.

Trial Examiner Norwood: Objection overruled.

A. I couldn't state the cost of oil yesterday.

Q. Well, can you give me a round figure of approximately the cost of producing a gallon of outside white paint at any time within the past few years?

A. You mean material cost?

Q. Yes, sir.

A. This is only a guess.

Mr. Duncan: Then I object, Your Honor.

By Mr. Wright:

Q. On what can you base a guess?

A. The only thing I can base a guess on is just from experience of seeing these formulas priced.

Trial Examiner Norwood: If this witness can give a fair estimate of something, why, he may, on something that relates to his business which he has been following for a number of years, he may do so.

Mr. Wright: Your Honor, Mr. Casey stated that he would base his guess on his experience in making up and pricing these lead paints. He has already testified that that goes back to 1920.

Trial Examiner Norwood: Well, if you can give
1346 us a fair estimate as an answer to that question, you may do so.

A. My estimate would be about a dollar and a half a gallon for raw material costs.

By Mr. Wright:

Q. Will you state the method of pricing outside white paint that is presently employed by Mound City?

Mr. Duncan: Objection.

Mr. Welch: I object.

A. Well, I don't quite understand the question.

By Mr. Wright:

Q. How do you sell outside white paint?

A. Well, we sell it list price which was established in 1941.

Q. Is that a price list which you publish?

A. That is right. That list is $2.65 a gallon less discounts as to different types of customers.

Trial Examiner Norwood: That is a ceiling price, is it?

The Witness: That is right, that is list ceiling price.

By Mr. Wright:

Q. Is that price list applicable for delivery in any area in which you sell?

A. Yes, sir.

Q. Are the same discounts given irrespective of
1347 the customer's location?

A. They are.

Q. Mr. Casey, you stated that the company does considerable business in the State of Texas in the sale of

house paint. In selling in the State of Texas does the Mound City Company absorb the freight?

Mr. Duncan: Your Honor, I object. I don't believe the record is such that this witness testified as to the fact he did a considerable business in the State of Texas. He said they did business in Texas, but I don't think he said considerable, therefore, I object to the question.

Trial Examiner Norwood: I think it may be an assumption that wasn't shown. How about that?

Mr. Wright: I am willing to withdraw the question, Your Honor.

By Mr. Wright:

Q. Mr. Casey, you stated, as I recall it, that your Company did business in the State of Texas?

A. That is right.

Q. Will you state how much of its business approximately is in the State of Texas?

A. About forty or forty-four per cent.

Q. Now, has that always been true?

A. That is since I have been there.

Q. Is any port of that business in the sale of out-
1348 side white paint?

A. Oh, yes, lots of outside white paint is sold in Texas.

Q. In selling outside white paint to Texas does Mound City allow freight to the customer?

A. They do.

Q. Can you give me an approximation of the freight rates either per hundred or per gallon involved in selling in Houston, Texas from St. Louis?

Mr. Duncan: Objection, Your Honor. I would like to renew the objection which we made in previous hearings as to any testimony relating to freight rates. I ask that the objection to the question and answer that involves that be implied each time so we won't have to get up and object each time.

Trial Examiner Norwood: Counsel may have his objection and I will overrule the same.

(To the witness.) Do you want the question read?

The Witness: Yes.

(Reporter read the last question.)

A. I think the freight rate from St. Louis to Houston is around a dollar and twenty-five cents.

By Mr. Wright:

Q. Is that per hundred?

A. Per hundred.

Q. Do you recall the freight rate which is ap-
1349 plicable to Dallas, Texas?

A. Ninety-five cents in truckloads.

Q. Does Mound City sell outside white paint in Fort Worth?

A. Well, I imagine they do. I don't keep track of all the accounts that they sell, but we sell the entire area of Texas.

Q. Mr. Duncan: I object to that, Your Honor, and ask that the answer be stricken from the record. It is based upon his imagination; it falls into the category of a guess.

Mr. Wright: Your Honor, he explained his answer, and I submit his answer is relevant and competent. He said that the Company sells over the entire area so he assumed they would sell in Fort Worth.

Trial Examiner Norwood: Read the question and answer.

(Reporter read the last question and answer.)

Trial Examiner Norwood: Objection overruled. Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. Will you state the freight rate applicable to outside white paint for Fort Worth?

A. I don't know.

Q. Do you recall the rate to Amarillo?

A. No, I don't.

Q. Is the factor of the freight rate absorbed by Mound City to markets in Texas and the Southwest im-
1350 portant in determining whether Mound City can compete from those markets?

Mr. Welch: Your Honor, we can't see from respondents' standpoint that difficulties this particular company may incur in connection with their sale of outsde white paints, even though they contain lead pigments, is any factor in this case as to what these respondents have been charged with doing.

Mr. Wright: Well, Your Honor, the complaint alleges that as a direct result of the pricing system engaged in by

the producers of lead pigments there is an injury to the secondary line of competition, the purchasers from these companies, an injury to their competition is a direct result of their pricing methods, and this testimony goes toward establishing that injury and difficulties that might be incurred by paint manufacturers in St. Louis competing in distant markets as a result of the pricing system of lead pigments certainly are relevant.

Trial Examiner Norwood: I think the situation in this line of commerce, the circumstances of this line of commerce are involved here.

Mr. Welch: Your Honor, he is asking this witness, as to this witness, this witness' company's absorption of freight, not National Lead or Sherwin Williams or Eagle-Picher's freight and pricing practices, but his own pricing practices.

Trial Examiner Norwood: That is a line of commerce that is involved here.

1351 Mr. Wright: Your Honor, the record already shows transactions by some of these respondents with the Mound City Paint and Color Works and also with other competing producers in that area.

Trial Examiner Norwood: I think you can show that. Objection overruled.

Mr. McDermott: I should like to object to the form of the question, sir. He has asked if it is important.

Trial Examiner Norwood: Read the question..

(Reporter read the last question.)

Trial Examiner Norwood: Objection overruled. Counsel may cross-examine him. Answer the question.

A. Well, freight rates or any other cost is a determining factor where you can do business. As the freight rates increase you naturally draw in your sphere of doing business around your home office or your place of producing.

By Mr. Wright:

Q. Do you know, Mr. Casey, whether there are paint manufacturers located in the State of Texas who do business there in competition with Mound City?

A. There are.

Q. Do those competitors produce outside white paints?

A. I couldn't answer that question because I don't know anything about their business.

Q. Does Mound City compete in Atlanta, Georgia?

1352 A. No.

Q. Does Mound City compete in Cedar Rapids, Iowa?
A. No.
Q. Does Mound City compete in Nashville, Tennessee?
Mr. DeBose: I object to this line of questions, if Your Honor please. The witness has already stated where they do business and I don't see the necessity of picking out particular towns. I submit that it is irrelevant and immaterial.
Trial Examiner Norwood: I don't know his object in bringing out the towns, but he may have—what do you say, Mr. Wright?
Mr. Wright: Your Honor, I am trying to establish with a little more particularity exactly the communities in which the company competes in order to ascertain the exact nature of that competition.
Trial Examiner Norwood: He has shown it generally but I think he may show particularly too.
Mr. DeBose: Your Honor, Cedar Rapids, Iowa, I believe the question was, isn't even in the states that were mentioned by the witness, I mean, there are forty-eight states.
Trial Examiner Norwood: Maybe that is the reason he wanted to ask him about that. Objection overruled.

By Mr. Wright:

Q. Do you recognize the name of the Kuhn Paint and Varnish Works, Houston, Texas?
1353 A. Yes, I do.
Q. Is the Kuhn Paint and Varnish Works at Houston, Texas a competitor of Mound City in the Texas area?
A. They are.
Q. Do you know the Hunsley Manufacturing Company of Amarillo, Texas?
A. I do.
Q. Is that concern a competitor of Mound City in the Texas area?
A. They are.
Q. Do you know the Pratt Paint and Varnish Company at Dallas, Texas?
A. I do.
Q. Is that concern a competitor of Mound City in the Texas area?
A. They are.

Q. Do you know Negley and Company of San Antonio, Texas?

A. I do.

Q. Is that company a competitor of Mound City in the sale of paints in the State of Texas?

A. They are.

Q. Do you know the Collins-Davoust Paint Manufacturing Company of Dallas, Texas?

A. I do.

Q. Is that concern a competitor of Mound City in
1354 the sale of paint in the State of Texas?

A. They are.

Q. Do you know the Fort Worth Paint Company of Fort Worth, Texas?

A. No, I don't. I never heard of them.

Q. Do you know the Great Western Paint Manufacturing Company of Kansas City, Missouri?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint in the area around Kansas City?

A. We don't go in the Kansas City area.

Q. Are you a competitor of that concern in any area?

A. I don't know what their trade area is.

Q. Do you know the Seidlitz Paint and Varnish Company of Kansas City?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Grand Island Paint Mills, Grand Island, Nebraska?

A. No, I don't.

Q. Do you know the S. E. B. Paint and Varnish Manufacturing Company of Oklahoma City, Oklahoma?

A. Never heard of them.

1355 Q. Do you know the Midcontinent Paint & Lacquer Manufacturing Company of Kansas City, Missouri?

A. No, I don't.

Q. Do you know the DeSoto Paint and Varnish Company of Memphis, Tennesse?

A. I do.

Q. Is that concern a competitor of the Mound City Company in the sale of Paint?

A. They are.

Q. Do you know the Waggner Paint Company of North Kansas City, Missouri?

A. I do.

Q. Do you recognize that as a competitor of the Mound City Company in the sale of paint?

A. I do.

Q. Do you know the Sewell Paint and Varnish Company of Dallas, Texas?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Reifschneider Paint and Glass Company of Omaha, Nebraska?

A. I do not.

Q. Do you know the R. H. Thorpe Paint Company
1356 of Omaha, Nebraska?

A. I do not.

Q. Do you know the Nelson Paint Company of Sioux City, Iowa?

A. I do not.

Q. Do you know the Napko Paint and Varnish Company of Houston, Texas?

A. I do not, never heard of them.

Q. Do you know the Paint Products Company of Houston, Texas?

Mr. DeBose: What was that?

Mr. Wright: Paint Products Company.

A. I do not.

Q. Do you know the Missouri Valley Paint Manufacturing Company of Kansas City?

A. No.

Q. Do you know the Sewall Paint and Varnish Company of Kansas City?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Anthony Manufacturing Company of Kansas City, Missouri?

A. I do not.

1357 Q. Do you know the Hanley Paint Company of El Paso, Texas?

A. No, I do not.

Q. Do you know the Rio Grande Lumber and Fuel Company of El Paso, Texas?

A. No.

Q. Do you know the A. C. Horn Company of Houston, Texas?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Paragon Paint Company of Houston, Texas?

A. Yes.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Mr. Casey, would a saving to your company of five cents per gallon on its material cost of white lead paint over the material costs of some of the competitors, particularly those located in Texas, strengthen the competitive condition of Mound City in that market area?

A. Mr. DeBose: If Your Honor please, I object to that question, it is hypothetical. This man is not qualified as an expert. I understand he is a practical witness.

Mr. Wood: I object to the question likewise, because the question strengthen the competitive situation is com-
1358 pletely indefinite.

Trial Examiner Norwood: Well, he may ask him, certainly if five cents more or less would make any difference in his ability to sell in that territory. I think we would all be happier if counsel would reform the question, but he may bring out that information.

Mr. DeBose: Could we have our memory refreshed as to the exact wording of the question?

Trial Examiner Norwood: Read the question.

(Reporter read the last question.)

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Mr. Casey, do the paint manufacturers located in the State of Texas with whom you are in competition at the present time, quote substantially the same prices on white lead paint as are quoted by Mound City to markets in the State of Texas?

Mr. Duncan: Your Honor, I object on the grounds it is not material, irrelevant, and anyway, the question is put

in the present tense. As I understand it this is a complaint over a certain period, the amended complaint I think was filed as of March of this year. When he puts it in the present tense, meaning now, I think it is highly objectionable.

Trial Examiner Norwood: I think he directed it to what the custom has been.

Mr. Duncan: He didn't so state.

Mr. Wright: Your Honor, I will state now that I am
1359 prepared to carry that question back as far as Mr. Casey's memory will go.

Trial Examiner Norwood: Objection overruled. Answer the question at the present time.

A. So far as I know, most paint houses quote on or about the same list.

Q. Now, has that always been true with reference to the State of Texas?

A. No. Prior to 1932 we got fifteen cents more a gallon for paint in Texas than we got in St. Louis.

Q. Do I understand your answer, then, that since 1932 you have gotten approximately the same as the Texas manufacturers?

A. That is right.

Q. And as you get in St. Louis?

A. That is right.

Q. Would a saving to Mound City of five cents per gallon on material costs of outside white paint over the material costs of outside white paints to competing manufacturers located in the State of Texas enable Mound City to compete more freely in the Texas area?

Mr. Wood: I object to that.

Mr. DeBose: I object to that on the same grounds.

Trial Examiner Norwood: Objections overruled. Let's see what this situation is.

A. Well, a five cent saving on material costs is al-
1360 ways welcome. On some items you don't make much more profit than five cents on material cost, so any saving would be welcome, whether it was five cents or two cents.

Q. Mr. Casey, are there any markets which Mound City is kept out of by the amount of freight which they must absorb to sell in those markets?

Mr. Welch: Your Honor, I think that is entirely too general.

Trial Examiner Norwood: Overruled, go ahead.

A. Well, if you are talking about the present time, I

would say no, because we don't have enough material to go around to our present customers, so we couldn't go out and take on new customers.

Q. Under normal conditions when you could secure all the lead pigments and other materials you wanted.

A. Yes, I think if there was a saving we would go farther from St. Louis or farther from the point of manufacture.

Q. Then would a saving in material cost over the material costs of competitors located at a distance from you enable you to extend your markets?

A. They would.

Trial Examiner Norwood: Well, a differential of five cents against you, would that affect your business adversely?

The Witness: Yes, sir.

1361 Trial Examiner Norwood: To what extent, do you have an idea of that?

The Witness: Well, we try to sell in markets where we can make some profit. You have always got a line of the farthest line you can go; if you get a saving you go over that line. If you get another charge against your material, you have to draw back on that line.

By Mr. Wright:

Q. Mr. Casey, you have been purchasing lead pigments, have you not, continuously since 1933?

A. I have.

Q. I believe you have stated that you were solicited by approximately three lead pigments manufacturers?

A. That is right.

Q. Are you ever offered a more favorable price or term or condition of sale by anyone of these producers than any of the others?

Mr. Duncan: I object to that, "are you ever offered". It is too general.

Mr. Wright: The question referred to the period since 1933.

Trial Examiner Norwood: Objection overruled.

A. No, we are not.

By Mr. Wright:

Q. Do you recall the Carter-White Lead Company

1362 of Omaha, Nebraska?

A. No.

Mr. Wright: No further questions, Your Honor.
Mr. DeBose: May we have a short recess?
Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

1363 Trial Examiner Norwood: Come to order, Gentlemen. You may proceed.
Mr. Wright: I would like to ask Mr. Casey another question.

By Mr. Wright:

Q. Mr. Casey, do you recall stating that you knew of the competition of a number of companies about which I asked you in the State of Texas?
A. I do.
Q. Are those companies generally full line paint companies?
A. They are.
Q. Do you meet in the State of Texas competition in the sale of outside white paint from those companies and others?
A. We do.
Mr. Wright: No further questions.
Trial Examiner Norwood: You may examine.
Mr. McDermott: No cross-examination.
Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.
Mr. Wright: Your Honor, I had anticipated we would take a little longer with this witness, and the next witness will not be back until two o'clock, that is St. Louis time. I suggest we adjourn to one o'clock, Central Standard Time.
Trial Examiner Norwood: We will recess until one
1364 o'clock, Central Standard Time.

(Whereupon, at 11:20 a. m., a recess was taken until 1:00 p. m., this day.)

1365 **Afternoon Session.**

1:00 p. m., Central Standard Time.

Trial Examiner Norwood: The hearing will come to order. Call your witness.

Mr. Wright: I would like to call Mr. Haddock to the stand.

J. P. HADDOCK was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Haddock, will you please state your full name and address for the record?

A. Business address?

Q. Yes, sir.

A. Joseph P. Haddock, H-a-d-d-o-c-k, Vane Calvert Paint Company—that is V-a-n-e, second word, C-a-l-v-e-r-t, Paint Company, 1601 North Broadway, St. Louis.

Q. What is your official position with the Vane Calvert Company?

A. Secretary and Treasurer.

Q. Over what period of time have you been in that position?

A. Since the first of this past year.

1366 Q. How long have you been connected with Vane Calvert?

A. Twenty-five years; a little over twenty-five.

Q. What is the business of the Vane Calvert Company?

A. Manufacturers of ready mixed paint.

Q. Over what period of time has Vane Calvert been so engaged?

A. Since 1867.

Q. Is that a long time in the paint industry?

A. It is the oldest mixed paint house in America.

Q. Does Vane Calvert sell a full line of paints?

A. A full line for the dealer, but we don't go into the industrial line, if that is what you mean.

Q. Does Vane Calvert produce and sell paints containing lead pigments?

A. Yes.

Q. What paints containing lead pigments?

A. Well, particularly of outside house paints.

Q. What lead pigments are contained in the outside white paints of Vane Calvert?

A. Well, we have lead carbonate—our formulas vary, depending on what we can get right now, but of an ordinary formula would be lead carbonate, lead sulphate, and possibly some leaded zinc.

Q. Do you recall the formulas for your outside white paints in normal business period?

1367 A. Well, it would be just about like I told you there.

Q. Can you state how many pounds of lead carbonate and lead phosphate would be included in a gallon of best quality outside white paint?

A. Six or eight pounds.

Q. Does Vane Calvert make a red lead paint?

A. Only on rare occasions.

Q. Can you state approximately the formula for the red lead paint?

A. Well, that would depend upon—a red lead paint would be something that would be sold to an industrial account, and we don't go after them very much, but I think red lead paint, it would depend upon that particular firm, as to how much red lead he wanted in the paint. It might vary anywhere, oh, I will say, from ten to twelve or fourteen pounds, of red lead.

Mr. Wright: Your Honor, may I have a short recess?

Trial Examiner Norwood: Five minute recess.

(A short recess was taken.)

Q. (By Mr. Wright.) Over what geographical areas does the Vane Calvert Paint Company solicit business and sell white lead paint, or outside white paint?

A. Well, our principal business is done in Missouri, Illinois, Arkansas, Louisiana, and Mississippi. We cover other States; that is, we sell in other States; but that is the principal business.

1368 Q. Is any considerable business done in the State of Texas?

A. We do some business in Texas, but I couldn't tell you how much, because that is done through a jobber; that is, shipment is done through a jobber; we sell some direct.

Q. Are those paints, when sold in those areas, customarily shipped from Vane Calvert to the customer, or do you maintain warehouses or jobbers?

A. Well, we ship direct to the customer, and in some cases, why, we may ship by carload to a distributor and he in turn sells it to dealers.

Q. Are the prices you quote on these pigments in these areas delivered prices?

A. Yes.

Q. Are the delivered prices which you quote for these products the same as to all geographical areas in which you quote?

A. I didn't quite understand what you meant by that.

Q. Do you quote the same delivered prices over the whole area in which you do business?

A. No.

Q. Will you state how you price such products in the St. Louis area?

A. Well, in St. Louis we have a list price and we give our dealer a discount of 12½%.

Q. How do you quote on white lead paint in Texas?

A. The material is delivered and the price is 18¢ 1369 a gallon higher than what it is here in St. Louis.

Q. Do you either prepay the freight or allow it, in shipping into Texas?

A. We allow it on the invoice.

Q. Allow it on the invoice?

A. That is right.

Q. From whom does Vane Calvert purchase lead pigments, from what suppliers?

A. We buy them from nearly all lead corroders; that is, we buy them from National Lead, Eagle Picher, I guess those are probably our two biggest sources.

Q. Do you buy from Glidden, Euston Division of Glidden?

A. Not that I recall.

Q. Do you purchase from Sherwin Williams?

A. We buy some things from Sherwin Williams, but whether we buy lead or not I don't know, but I don't think we do.

Q. Are you solicited for business by all the corroders of lead?

A. No.

Q. Can you state in round numbers the amounts of basic

carbonate and basic sulphate that Vane Calvert Company purchases annually?

A. No, I could not.

Q. Does Vane Calvert enter into contracts with corroders of lead covering purchases of basic carbonate and basic sulphate?

1370 A. Well, I don't know whether there are any contracts existing now, but prior to the time I left for the service we did have, we did contract, but it may be just bought on the open market now; I wouldn't be sure of that, unless I checked it.

Q. Mr. Haddock, can you state roughly the relation of the cost of the lead pigments contained in your outside paint to your total outside white paint cost, per gallon?

A. Well, would that be figured on today's price of lead?

Q. Well, if you can do it on today's price?

A. I think I would have to take a minute and do a little figuring. I could probably tell you.

Q. Well, will you try to recall them?

Mr. Duncan: Your Honor, I object on behalf of Respondents, inasmuch as we contend that has nothing to do with price, as we have formerly maintained. We therefore ask that the objection be sustained.

Trial Examiner Norwood: Objection overruled. Approaching the subject, they expect to connect it up, as they said this morning. It is a similar matter. Of course, if it is not connected up, it will not be considered at all.

A. From the information I have it would only be guesswork. I would have to figure it out at the plant.

By Mr. Wright:

Q. Do you have any idea of what the relation of the white lead cost to the total material cost per gallon
1371 of that paint would be in 1940?

A. Well, assuming that we had about 8 pounds of white lead in a gallon of paint in 1940, at 8¢ a pound, that was 64¢; oh, that would be around may be a third of the entire cost; but I don't believe we had 8 pounds. I had better figure that about 6 pounds.

Q. Well, would it be a substantial portion of the total material cost?

Mr. DuBose: I object to the use of the word "substantial."

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Would it be a substantial portion of the material cost, cost of the lead pigments?

A. Cost of the entire paint, or cost of the pigments only?

Q. Would the cost of the pigments in the paint be substantial as compared to the total cost of materials in the paint?

Mr. Welch: Does that question mean lead pigments?

Mr. Wright: Yes.

A. You are talking about the cost of the lead pigments in the paint in relation to the total cost of the paint?

Q. Yes, sir.

A. Oh, it would probably be in the neighborhood of 25% to possibly a third.

Q. Is the factor of freight rates and charges in-
1372 volved in shipping mixed paint to the markets in which Vane Calvert competes an important factor in determining where Vane Calvert can compete?

Mr. Duncan: We object to the question; it is immaterial, your Honor.

Trial Examiner Norwood: Overruled.

A. Yes.

By Mr. Wright:

Q. Do you recall the freight rate from St. Louis to San Antonio on white lead paint?

A. $1.67.

Mr. Duncan: Your Honor, on behalf of the Respondents, we have an objection, the same objection concerning rates.

By Mr. Wright:

Q. Do you recall the freight rates applicable on shipments of white lead paint to New Orleans?

A. No, I don't.

Q. Do you recall whether they are substantial?

Mr. DuBose: Same objection.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wood: I would like to object to the question with respect to New Orleans, because it didn't specify
1373 whether it is rail or boat, and a great deal of shipping down the river is done by boat. I think it should be specific.

Trial Examiner Norwood: Read the question again.

(Question read by reporter.)

Trial Examiner Norwood: Well, that last question standing by itself doesn't mean anything. It doesn't compare it to anything else. If counsel will reframe that question, I think we will all be happier.

Mr. Wright: I will withdraw that question, your Honor.

By Mr. Wright:

Q. Mr. Haddock, does the Vane Calvert Company solicit business in Minneapolis and St. Paul, Minnesota?

A. No, we do not.

Q. Have they ever, to your knowledge?

A. Yes, at one time; it has been years ago.

Q. Does the Vane Calvert Company compete in the area around DesMoines, Iowa?

A. No.

Q. Around Sioux City, Iowa?

A. No.

Q. Around Lincoln, Nebraska?

A. No.

Q. Omaha, Nebraska?

A. No.

1374 Q. Do you know the Collins Davaust Paint Company of Dallas, Texas?

A. No, I do not.

Q. Do you know the Sewell Paint and Varnish Company of Dallas?

A. I know of them, yes.

Q. Is that company in competition with the Vane Calvert Company?

A. Yes.

Q. Do you know the A. C. Horn Company of Texas, of Houston, Texas?

A. No, I always thought Horn was north, Detroit.

Q. Excuse me, I didn't get that?

A. I thought Horn was in Detroit. I didn't know they had a place in Texas.

Q. You don't know whether the A. C. Horn Company at Dallas is in competition with Vane Calvert?

A. No, I do not.

Q. Does the Vane Calvert Company compete in any area with Kohler McList Company of Denver, Colorado, or the Floorman Manufacturing Company of Pueblo, Colorado?

A. No.

Q. Do you know the Sewell Paint & Varnish Company of Kansas City, Missouri?

A. Yes.

1375 Q. Is Vane Calvert Company in competition with that company on outside white paint in Kansas City and in that territory?

A. Well, not in Kansas City. We are probably in competition with them in the vicinity of, say, St. Joe, Missouri, because that is probably where we would meet, outside of the city.

Q. Are you acquainted with the Anthony Manufacturing Company of Kansas City?

A. No.

Q. Are you acquainted with the McMurtry Manufacturing Company of Denver, Colorado?

A. No.

Q. Are you acquainted with the Pratt Paint & Varnish Company of Dallas, Texas?

A. No.

Q. Are you acquainted with the Hanley Paint Company of El Paso, Texas?

A. No.

Q. Are you acquainted with Paint Products Company of Houston, Texas?

A. I have heard of them, but that is all.

Q. Are you acquainted with Paragon Paint Company of Houston, Texas?

A. No.

1376 A. Are you acquainted with the Cune Paint and Varnish Company of Houston, Texas?

A. I have heard of them, but I do not know that we are in competition with them.

Q. Are you acquainted with the National Paint and Varnish Company?

A. No.

Q. Of Houston, Texas. Does Vane-Calvert compete in Georgia?

A. Yes, we sell them in Georgia.

Q. Do you know the Arlington Paint and Varnish Company of Atlanta?

A. No.

Q. Do you know the Merchants and Manufacturers Paint Company of Louisville, Kentucky?

A. I have heard of them, yes.

Q. Do you know whether they are in competition with you in any area?

A. We don't sell anything in Kentucky to talk about.

Q. Are you acquainted with the Hunsley Paint Manufacturing Company of Amarillo, Texas?

A. No.

Q. Mr. Haddock, in all of the areas in which you state Vane-Calvert competes, do you meet competition on outside white paints of manufacturers who are located in those areas?

A. I would say that our principal competition in
1377 the areas we sell are competing with St. Louis manufacturers.

Q. Well, now, does that apply in the State of Texas, too?

A. No, probably in Texas our competitors would be Sewell, Pittsburgh and probably Sherwin Williams.

Mr. Wood: Did the witness state what he means by "Pittsburgh"?

Trial Examiner Norwood: Pennsylvania. Counsel may cross-examine him on that later. I think that would be better.

By Mr. Wright:

Q. Mr. Haddock, is the factor of the freight charges which must be paid by Vane-Calvert important in determining the limits of the areas in which it can compete?

A. Yes.

Mr. DuBose: Same objection, I suppose, to that.

Trial Examiner Norwood: Yes. Overruled.

By Mr. Wright:

Q. Is price important in determining whether you can sell paint in any of these areas?

Mr. Duncan: Same objection.

Trial Examiner Norwood: Overruled.

A. Yes.

By Mr. Wright:

Q. Would the difference of a few cents, say ten cents per gallon, in the price of outside white paint in Texas determine business as between you and one of your competitors?

1378 Mr. Wood: Objected to as leading.

Trial Examiner Norwood: Overruled.

A. I believe it might take more than ten cents a gallon to get the business. It would have to be—the entire line would be considered.

By Mr. Wright:

Q. Assuming now that you and your competitor were selling identical paints so far as the pigment and vehicle is concerned?

A. I don't believe—well, in today's market that ten cents a gallon would mean that much.

Q. In ordinary times, when paint can be secured readily?

A. It might be a factor.

Q. Mr. Haddock, would a saving to you of five cents a gallon on your material costs over the material costs of your competitors located in Texas, say, assist you in competing in that area?

A. I would say no.

Q. Will you explain your answer?

A. Well, I don't believe five cents a gallon is enough, enough difference between the two.

Q. Approximately how much freight per gallon do you pay in selling in Texas?

A. Well, figuring an average of about a dollar and a half a hundred, it would be about twenty-two cents a
1379 gallon, twenty cents.

Q. Which you absorb when you do business down there?

A. Well, no, we add eighteen cents to our local price and then absorb the freight.

Mr. Duncan: If Your Honor please, I ask the answer go out inasmuch as this witness said the principal business was done in states other than Texas. He said Missouri, Illinois, Arkansas, Louisiana, Mississippi. The only business they did was through a jobber.

Mr. Wright: Your Honor, I submit the witness testified as to the extent of the business in Texas.

Trial Examiner Norwood: Objection overruled. Let him tell us exactly how this is.

By Mr. Wright:

Q. Mr. Haddock, speaking now of the period in 1933 to the present, were you ever offered any more favorable prices for terms of sale by any one of the lead corroders over any of the others on dry white lead or dry red lead?

A. To my knowledge, no.

Mr. Wright: I have no further question, your Honor.
Trial Examiner Norwood: Cross-examination.
Mr. Welch: May we have a recess now?
Trial Examiner Norwood: Five-minute recess.
(A short recess was taken.)

1380 *Cross-Examination by Mr. McDermott.*

Q. We will have just a few questions on cross-examination, sir. In describing the formula, Mr. Haddock, of your paint, I believe you estimated that there were about six pounds of pigment in the paint?

A. No, it was a question on six to eight pounds of white lead in the paint.

Q. Well, now what form is that white lead in your paint?

A. It would be in the form of lead carbonate, lead sulphate and leaded zinc, all three forms.

Q. All three. Can you give us the proportions or the poundage of the three categories?

A. No, our formulas, they vary from time to time, depending upon what we can get the most of.

Q. Well, would that also vary the amount of lead in the paint?

A. Well, we try to maintain possibly the same amount of lead in the paint, but in its various forms.

Q. Well, now in leaded zinc, for instance, there is a lesser quantity of lead, isn't there?

A. That is right, there are two types made.

Q. Will you describe those?

A. Well, one is a 35, what they call a 35 per cent leaded zinc, in which 35 per cent of the pigment is lead, and then there is another one called 50 per cent leaded zinc, in
1381 which half of it is lead.

Q. What proportion of the paint of the pigment in the paint is leaded zinc?

A. I don't know whether I could answer that without looking at the formula.

Q. Well, now, would it be fair to say that the amount of lead in the paint might vary from three to four to six pounds per gallon?

A. Well, you mean white lead, has white lead, or a particular lead, like lead sulphate or lead carbonate?

Q. The lead, including carbonate, sulphate and leaded zinc.

A. Would vary, you say, from four to six pounds?

Q. Three to four to six pounds.

A. Yes.

Q. When you referred before to Pittsburgh as being one of your competitors, did you mean Pittsburgh Plate Glass Company?

A. Yes.

Q. In referring to that company as being a competitor, did you mean in the area, entire area in which you sold, or just in Texas?

A. Well, I believe the question was about Texas, but we could consider them a competitor in our entire area, because they are national.

Mr. McDermott: That is all. Thank you.

Trial Examiner Norwood: Any further questions?

1382 Mr. Wright: No further questions.

(Witness excused.)

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, I would like to state at the outset that there is a gentleman at the counsel for respondents' table that I have reason to believe is the manager of the St. Louis branch of the National Lead Company, and I have reason to believe that he is intimidating the witnesses, and I would like to ask that he be excluded from the hearing while the next witness is on the stand.

Mr. McDermott: May I ask if Mr. Wright has any foundation for that statement that our man is intimidating witnesses?

Mr. DuBose: I really think Mr. Wright—

Mr. McDermott: (interposing) Just a minute.

Mr. Wright: The circumstances are such at the present time that these witnesses who are customers of the National Lead Company, who are having a very difficult time in securing lead pigments, are afraid of the National Lead Company, and the presence of this gentleman in the room acts as a deterrent to them on the stand.

Trial Examiner Norwood: Is he one of the respondents?

Mr. Wright: He is an employee of the respondent.

1383 Trial Examiner Norwood: I will ask him to withdraw.

Mr. McDermott: Before proceeding, sir, I should like either one, to have Mr. Wright withdraw the statement

that we are intimidating witnesses, or else be given the opportunity of recalling those witnesses and letting them say from the witness stand whether they have been intimidated or not.

Mr. Wright: Well, your Honor, I am not going to say that there has been any deliberate effort on the part of this gentleman to intimidate the witnesses, but the circumstances are such that his presence here is a deterrent to them and I know that for a fact.

Mr. DuBose: We would be glad to ask him to go back—I am sure he would be glad to. I would like to make this motion—I think Mr. Wright will think it over—that this whole colloquy go off the record, be stricken bodily from the record.

Trial Examiner Norwood: Whatever you say about that.

Mr. Wright: I am perfectly willing to have the colloquy stricken from the record, but I wish—

Mr. McDermott: Just a minute.

Mr. DuBose: Just a minute.

Mr. McDermott: Now wait. We are entitled, sir, as I see it, to have a representative here who knows the business and who can advise us with respect to the facts, are we not?

1384 Trial Examiner Norwood: He can advise you without being here, while his customers are witnesses here. I think that should be done. We have had a great deal of experience in these cases.

Mr. McDermott: Then we shall have to ask to be given an opportunity to prepare for cross-examination after the witnesses testify.

Trial Examiner Norwood: I have always given you that opportunity.

Mr. McDermott: And we shall have to have an opportunity, or have to ask for an opportunity to confer with a representative of the Lead Company.

Trial Examiner Norwood: You can have what has been given here.

Mr. McDermott: Beg pardon?

Trial Examiner Norwood: You may have the time you have been having. I have been giving you a recess. I think that is all that is necessary. Now, call your next witness.

Mr. Wright: Yes, Mr. George Niedt.

Trial Examiner Norwood: Has the gentleman you mentioned withdrawn? I don't know which one he is.

Mr. Wright: Yes.

Mr. DuBose: I will have to make a motion to withdraw my motion to strike from the record; as long as they have gone this far, it is probably better this way.

1385 Trial Examiner Norwood: All right. I will ask you not to consult any counsel in this case at all until you have finished your testimony.

Mr. Niedt: Do I know any of them? I didn't understand.

Trial Examiner Norwood: You know what you know, but not consult with any counsel in this case with these gentlemen you see here.

Mr. Niedt: Yes, sir.

Trial Examiner Norwood: Until after you have been discharged as a witness.

Mr. Niedt: Yes, sir.

Trial Examiner Norwood: Proceed.

Mr. McDermott: May I say something, sir, before proceeding?

Trial Examiner Norwood: Yes.

Mr. McDermott: I think you may be under a misapprehension. You cautioned the witness not to consult with any counsel for the respondent, and if your Honor has the impression that we have talked to or consulted with any witness who has testified here today, you are mistaken.

Trial Examiner Norwood: No, I will say now I haven't the slightest suspicion that counsel has discussed that at all. It is an instruction that we usually give at the opening of the hearing in every case, and I

1386 omitted it. Inasmuch as this came up, I thought I would mention it, too, for this reason: A great many of your witnesses are either respondents themselves or they are employees, and I have had respondents accuse Commission Attorneys of sharp practice for summoning or subpoenaing those witnesses without consulting them or giving them time to talk to the witness. I can show you that on one record particularly, more than once, so I want to clarify our thought on that. These respondents, until they complete their testimony, are the government's witness and shouldn't be consulted.

Mr. McDermott: I would like to say for the record

here on behalf of myself and all other counsel that I know that no one of us has talked with any one of the witnesses who have testified today, either before or after their testimony.

Trial Examiner Norwood: Yes.

Mr. Wright: In case there is any doubt, I will be glad to state that I am not meaning to accuse any counsel for the respondent of any wrongdoing in this situation.

Mr. McDermott: Why did you use the word "intimidate"?

Mr. Wright: Because I think it accurately reflects the situation.

Trial Examiner Norwood: He explained that and I don't question the counsel's statement here about that.

Possibly I gave my instructions at the wrong time.

1387 Mr. Wood: I would like the instructions clarified a little bit for my own information and that of the other counsel. I have been in the habit of talking freely during the proceedings of cases, trust cases and others, so have all other lawyers as far as I know; if the Commission's practice is different, I think we should be very specifically instructed so we can use due care.

Trial Examiner Norwood: The witnesses are instructed not to confer with counsel until they have completed their testimony and especially with counsel on the opposite side.

Mr. Wood: Does that include our own witnesses, for instance, if an Eagle-Picher man is called, would he be precluded from talking to me during the recess?

Trial Examiner Norwood: Well, I don't go so far as that, but I have had instances where you have written questions and answers, a long list of written questions and answers, and where in cases I have known the witness during a recess to go and read his answers from that list that has been made during consultation to see what is coming up next. I have requested them not to do that, and not to discuss the matter with their own counsel until they complete their testimony.

Mr. Wood: I just want instructions where in any case, in every respect the Federal Trade practice varies from the ordinary Federal Court practice.

1388 Mr. Welch: Does your Honor mean from the time they receive a subpoena they can't talk to their own counsel or from the time they take the stand?

Trial Examiner Norwood: From the time they receive the subpoena they shouldn't be consulted by counsel from the opposite side.

Mr. Welch: If a Sherwin Williams employee is subpoenaed to testify in this case, he cannot talk to me at any time before he goes on the stand about what his testimony is to be?

Trial Examiner Norwood: After he is subpoenaed.

Mr. Welch: That is not the way I understood the practice to be.

Trial Examiner Norwood: Proceed.

GEORGE E. NIEDT was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name and address for the record, Mr. Niedt?

A. George E. Niedt, (spelling) N-i-e-d-t, president of Steelcote Manufacturing Company, 3418 Gratiot Street, St. Louis, Missouri.

1389 Mr. Welch: I didn't hear that.

(Reporter read the last answer.)

Mr. Welch: Will you spell that name?

The Witness: (Spelling) S-t-e-e-l-c-o-t-e, Steelcote; it is one word.

By Mr. Wright:

Q. How long have you been in that position with the Steelcote Company?

A. My brother and I organized the business thirty-one years ago.

Q. Your services have been connected with his ever since?

A. Yes.

Q. What is the business of the Steelcote Manufacturing Company?

A. Manufacturing of paint, varnishes, enamels, lacquers, waterproofing, putty, caulking compounds, various and sundry items affiliated with the business.

Mr. Duncan: May we have the witness raise his voice a little bit? I can hardly hear him.

Trial Examiner Norwood: Yes, speak a little louder.

By Mr. Wright:

Q. Over what areas does the Steelcote Company sell and distribute these products?

A. Well, our general line, which is known as the—
which would come under the category of house
1390 paints and such items, are sold in a rather restricted area, within an area, I would say, of about 600 miles of St. Louis, but we make many specialty items on which we do a national business, and in fact ship to many foreign countries.

Q. Do any of the products on which you do national business contain lead pigments in any appreciable amount?

A. Yes, some of the products that we manufacture for national distribution, particularly one, contains lead, but I wouldn't say in any great appreciable amount.

Q. What product is that that you were referring to?

A. Well, our rubber enamel primer.

Q. What lead pigment does that contain?

A. By percentage or by weight per gallon?

Q. What type?

A. We use lead carbonate in there to some extent.

Q. How many pounds of lead carbonate per gallon?

A. The total lead content in that is 4.25 pounds to a gallon.

Q. Do you make any metal protective finishes which contain lead pigments?

A. Well, this is a metal protective finish.

Q. Do you make red lead paint?

A. Very little, very little red lead paint.

Q. Has the Steelcote Company ever made any great amount of red lead paint?

A. No, we have never gone after the structural
1391 iron trade to any extent.

Q. In connection with your general line of house paints, you stated those were marketed within an area of 600 miles of St. Louis?

A. I would say approximately, yes.

Q. Why don't you have national distribution on those products?

A. Well, you can't very well compete on freight to points because in the first place those heavy products are close margin goods, and in order to compete in the distant points, of course, the freight would enter into it,

which would bring the cost up to that point that your price would be out of line.

Mr. Duncan: For the sake of the record, I would like to object to that line of inquiry relating to freight, as we have to other witnesses.

Trial Examiner Norwood: Objection overruled.

Mr. Wright: Would you read the last answer, please?

(Reporter read last answer.)

By Mr. Wright:

Q. You referred to "close margin" there; will you explain that?

A. Well, house paints and the general line of products are highly competitive in all areas, and you don't receive the margin of profit in those lines as you would in items that we referred to as specialties.

Q. Now, in your house paints, do any of those 1392 paints contain lead pigments?

A. Yes.

Q. Do you recall the formula of any of them?

A. I can tell you the percentage of lead and zinc in them and the approximate percentage.

Q. Will you do that, please?

A. Well, we make one that is known as the 101-X extra heavy house paint white.

Mr. McDermott: May we ask the witness to keep his voice up a bit, sir?

Trial Examiner Norwood: Just a minute, speak a little louder.

A. We make one product, 101-X extra heavy outside white house paint. That product contains 7.76 pounds of lead to the gallon.

Q. In what form is that lead mixed in the paint? Is that carbonate, basic carbonate?

A. In that particular case, we use some 50 per cent leaded zinc, of which we use 400 pounds, 200 pounds of which is lead, and then we use 575 pounds of lead carbonate in a hundred gallons of paint, making the average lead content 7.75 pounds to the gallon—

Mr. Duncan: (Interposing.) Your Honor—

A. (Continuing.)—in that grade of paint.

Mr. Duncan: I don't mean to interrupt until you 1393 are through. Are you through?

The Witness: Yes.

Mr. Duncan: I notice the witness is reading these figures from a paper which he has in his hands. Until it is shown that he is unable to give the statistics without the aid of that paper, I ask that the answers which he has given based upon which he has read from the paper go out of the record.

Trial Examiner Norwood: Well, I cannot do that, but counsel may see this, and we may go into this matter of the paper at this time, since you have raised an objection. What is that paper, is that something you made up?

The Witness: The attorney for the Federal Trade Commission asked me to secure—have information on the content of lead in various paints that we manufacture that contain lead. He wanted to know the approximate material cost of those items. He wanted to know in which territories they were sold, and he also asked that I know the approximate percentage of lead in each gallon.

Trial Examiner Norwood: And these are the figures, the data you have?

The Witness: Yes, I wouldn't be able to commit from memory.

Trial Examiner Norwood: Where did you get those figures?

1394 The Witness: I had our technical staff get them for me.

Trial Examiner Norwood: Did you verify them?

The Witness: I saw the formulas and I checked with our chemist.

Trial Examiner Norwood: You are testifying to the truth of what you have been saying in regard to the figures, I suppose?

The Witness: Yes, sir.

Mr. McDermott: Sir, the witness' preceding answer I didn't catch; he dropped his voice at the end.

(Reporter read the preceding answer.)

Trial Examiner Norwood: The witness is refreshing his memory from this. Counsel may see it if he wants to.

Mr. Duncan: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Duncan: On the record.

Trial Examiner Norwood: Yes.

Mr. Duncan: I looked at this paper which the witness first gave you and that you turned over to counsel for

respondents, and I notice that a column on the right-hand side is in entirely a different hand than that appearing on the balance of the paper.

The Witness: That is right.

1395 Mr. Duncan: May I ask the witness some questions?

Trial Examiner Norwood: Ask the witness all about it.

Mr. Duncan: This paper you have had in your hands here, you say it was prepared by your chemist?

The Witness: My chemist gave the figures and the information to my office manager, and that is his handwriting that you see all over the paper, but he gave me only the percentages of lead, and I told him that wouldn't enable me to arrive at the amount of lead and zinc, so I had him get the formulas down and those figures are mine on the right hand that I copied from the formulas indicating the lead and zinc content of those paints.

Mr. Duncan: Then the data upon which you base your percentages was gathered by someone else, is that right?

The Witness: The data on percentages was gathered by my chemist, who is familiar with the formulas.

Mr. Duncan: I see. We renew our motion at this time and ask that the two answers based upon the paper which he had in his hand be stricken from the record.

By Mr. Wright:

Q. Well, Mr. Niedt, were the answers which you have given based on your own knowledge?

A. Yes, the amount of lead content is based on my own knowledge because I copied off the formulas as indi-

1396 cated on the figures on the right-hand side of the paper.

Q. Mr. Niedt, you are president of Steelcote Company, I believe you testified?

A. Yes.

Q. Are you thoroughly familiar with the affairs of the company?

A. Yes, I started from the ground up.

Q. And are you familiar with the information which appears on that paper of your own knowledge?

A. Yes, I am.

Mr. Wright: Your Honor, I submit on the basis of those answers that the motion should be denied.

Trial Examiner Norwood: I think the paper was made to refresh his recollection from. He is swearing inde-

pendently to the truth of these statements he is making and motion to strike is denied. You may cross-examine him further on all of it. You may use the paper.

Mr. Wright: Where were we?

(Reporter read answer preceding objections.)

By Mr. Wright:

Q. Do you make other house paints containing white lead?

A. Yes, we make one we call our standard Steelcote.

Q. Will you state the percentage of lead carbonate and other lead pigments contained in that?

A. Well, it contains a total percentage of 33.66 per
1397 cent of white lead—of lead, that is carbonate and the lead in the leaded zinc combined.

Q. Can you state how many pounds of lead carbonate per hundred gallons go into that paint as lead carbonate?

A. Yes, there's 200 pounds of lead carbonate and 160 pounds of lead that was combined with the 50 per cent leaded zinc, making a total of 360 pounds of all lead, 3.6 pounds of lead in one gallon.

Q. Do you have the formula for any red lead paint?

A. Yes, we make what we call a red lead paint, but we make so little of it, it is a hundred per cent red lead, the pigment portion of it.

Q. How many pounds of red lead per hundred gallons are used in manufacturing?

A. 2,000 pounds.

Q. 2,000 pounds per hundred gallons?

A. That is right.

Q. That would mean 20 pounds of lead per gallon?

A. That is right.

Q. Do you solicit business in red lead paint of that formula?

A. No, we do not. We don't go out of our way to get it, but occasionally when we contact an industry and they require a little red lead, we sell it along with the job. We make no special effort to get red lead business.

Q. Does Steelcote compete in Texas for this gen-
1398 eral line of house paints?

A. Well, we have a few dealers in Texas, but we don't do any considerable volume there.

Q. But you do some business there?

A. Yes, we have a few accounts there.

Q. Do you do business in Louisiana on your general line?

A. Yes, we do.

Q. Do you do business in Arkansas?

A. Yes, some in Arkansas.

Q. Do you do business in Georgia?

A. Well, we don't have much in Georgia, but we have sold some paint in Georgia, in the vicinity of Rome, Georgia, I believe.

Q. Can you state what other states within that 600 mile zone, so to speak, that you compete for business in?

A. Well, it hasn't really been necessary in the last few years to compete; it is a question of having goods, but in the normal years—

Q. (Interposing.) In normal years when there is sufficient supply.

A. Yes, in normal years we were never permitted—able to go much further south tha Texas.

Mr. Du Bose: I can't hear.

Mr. McDermott: We can't hear.

The Witness: In normal years we were never able 1399 to go much further south than Texas in competing on the general line of goods.

By Mr. Wright:

Q. You go north, Mr. Niedt?

A. Well, we hit Iowa points, and in Minnesota, Wisconsin.

Q. Do you sell in the Twin Cities, Minnesota?

A. Yes, we don't sell much house paint there; we sell more specialties, our business is so mixed.

Q. You do solicit business in house paints there?

A. No, we don't go after it when it gets too far from home. Now we do sell some along with specialties we happen to be selling. We have one jobber there.

Q. Are you able to compete for business in house paints in Minneapolis and St. Paul against the local producers on house paints?

A. Well, I am not in a position to say that we could or couldn't, because we have never made any real effort to sell that distance from home, that is, the general line.

Q. I understand from your testimony that was because of the freight angle?

Mr. Duncan: I object to the question. I think he has already answered it.

Trial Examiner Norwood: Objection overruled.

A. Well, the freight to the Twin Cities at the present time is 98 cents a hundred, which seems to me would
1400 put us out of the running with large concerns like Minnesota Linseed Company and similar concerns located to the north.

By Mr. Wright:

Q. Do you know the Frost Paint and Oil Corporation of Minneapolis?

A. No, I don't know them.

Q. Do you know the Midwest Paint Manufacturing Company of Minneapolis?

A. I know them by name only. I don't know them.

Q. Do you know the Power Beam Paint Manufacturing Company of Minneapolis?

A. No, I do not.

Q. Do you know Farwell-Osman-Curf of St. Paul?

A. I know of the company.

Q. Are you in competition with that company in that area?

A. Well, we don't have, as I say; we don't sell much general line and on our specialties, we don't have much competition in that area. We make items that are remote from the general line and contain specific things and do specific things that are not accomplished by some of these other items; therefore, we don't run into the Osman-Curf and other paint manufacturers who do not make that trademark item.

Q. In offering your general line of house paints for sale, how do you price them?

A. Well, we price them f. o. b. St. Louis.

1401 Q. You add freight from St. Louis to—

A. (Interposing.) Yes, the general lines comes under the category of heavy goods line; that is all f. o. b. St. Louis, no matter where we sell it.

Q. Do you ever absorb freight?

A. I think in some points, in Texas, we have absorbed fifty cents a hundredweight freight in order to be in a position to compete more favorably with the local competition.

Q. You mean by "local competition", you mean paint manufacturers located in the State of Texas?

A. Yes, we might do that in other areas as well. I know we did do it in Cleveland at one time.

Q. In Cleveland, did I understand you to say?

A. Yes.

Q. Would a saving to Steelcote of five cents per gallon on the outside house paint containing lead pigments in material costs over the costs of competitors located in the State of Texas be important to Steelcote in meeting the competition in Texas?

Mr. Du Bose: Same objection.

A. I think that—

Trial Examiner Norwood: (Interposing.) Wait a minute. Read the question.

(Reporter read the last question.)

Trial Examiner Norwood: Objection overruled.

1402 Answer that question.

A. Well, in order to arrive at five cents on the general line of house paint, the lead would have to be sold to us at about a cent and a half a pound less than what we are paying for it now, or then we were paying for it at any time.

Mr. McDermott: I move to strike the answer as not responsive.

Trial Examiner Norwood: Let him complete it, then I will consider that.

Mr. Wright: I will withdraw that motion.

Trial Examiner Norwood: Motion allowed, and is struck by agreement, you might say. Now read the question and let him answer it, answer the part that is material.

(Reporter read the question.)

A. Well, of course, that wouldn't be a great saving, five cents a gallon.

Trial Examiner Norwood: Would it affect the trade?

The Witness: I don't think five cents a gallon would make a great difference.

By Mr. Wright:

Q. Would ten cents a gallon make much difference?

A. Well, the higher you get, of course, the more difference it is going to make, but I doubt they would pay any attention to five cents a gallon difference in the purchase of a gallon of paint.

1403 Q. Mr. Niedt, you stated, I believe, that you had been with Steelcote for 31 years?

A. That is right.

Q. Speaking now of the period from 1933 to the present, have any of the lead corroders offered you any more favorable prices or terms or conditions of sale than any of the other lead corroders at any time?

A. Yes, I believe that was true in that intervening period; at some time there was a new company started, they were selling their lead for a quarter of a cent a pound under National Lead Company.

Q. What company was that, do you recall?

A. I think it was known as the Southern White Lead or Houston White Lead; I don't remember which.

Q. Is that the only exception you can think of?

A. Well, there were short spaces of time when you might find a little difference between National Lead and some competitors; National Lead might have been a little lower, but eventually when the price cards came out, they seemed to be quite equal all around in their prices.

Q. Does Steelcote ever enter into any contracts for purchase of lead pigments with corroders?

A. We did before the war. That was common practice then.

Mr. Wright: No further examination.

Mr. Du Bose: May we have a five-minute recess?

1404 Trial Examiner Norwood: You may have a five-minute recess.

(A short recess was taken.)

1405 Trial Examiner Norwood: Come to order, gentlemen.

Proceed with the cross-examination.

Cross Examination.

By Mr. McDermott:

Q. Mr. Niedt, you have described in your testimony two of your outside house paints. The first one you referred to as the 101-X, I believe?

A. That is right.

Q. Can you tell me whether the figure of 7.76 pounds of lead to the gallon of that paint is 7.76 pounds of pure lead?

A. No, it is not. It is 7.76 of total lead content of which 5.76 is lead carbonate and the other 200 pounds is the lead that was contained in the 50 per cent lead and zinc that we purchase.

Q. You said 200 pounds?

A. Yes. See, we use 400 pounds of lead zinc in 200 pounds, half of which is lead.

Q. So that when you speak of 200 pounds that is per 100 gallons?

A. Per 100 gallons, yes.

Q. Now, referring again to the standard quality, I think you said it was?

A. Yes.

Q. What is the amount of poundage of pure lead per gallon of paint or per 100 gallons, whichever is more convenient for you?

A. Well, it would be 200 pounds of lead carbonate
1406 in 100 gallons of paint and 320 pounds of 50 per cent lead zinc, half of which must be lead, must be added to that making a total of 360 pounds of lead.

Q. So that would be 3.6 pounds per gallon?

A. That is right.

Q. Of pure lead?

A. That is right. And I might add that that is the one that we would not sell in great quantity, the first one, extra heavy outside white, we do not sell a lot of it; that is a premium piece of goods.

Q. And I assume that it is sold at a premium price?

A. That is right.

Q. Just to clarify my own state of mind on that standard brand of paint, the 3.6 pounds of lead per gallon is the pure lead?

Mr. Wright: Your Honor, I object to that question. I do not believe the witness referred to a standard brand.

Mr. McDermott: If I remember his testimony correctly, he said that one was called the 101-X, and the other was the standard. I base my question upon my recollection of the witness's testimony. If I am in error I would like to have the witness clear it up.

Mr. Wright: Your Honor, I think it would be perfectly easy to refer to that paint by the number by which it has been referred to heretofore.

1407 Trial Examiner Norwood: Can counsel recall his question there so as to meet this suggestion? I think that would be the shortest way.

By Mr. McDermott:

Q. Mr. Witness, you gave us one brand of paint and said it was the 101-X?

A. That is right.

Q. And that is your premium paint that sells at a premium price?

A. That is right.

Q. The other type of outside house paint that you testified about is what you call the standard?

A. That is known as Standard 101—does not have the X.

Q. Standard 101?

A. Yes, and that is a lighter body paint.

Q. Now, that paint you said, if I recall your testimony correctly, contained 3.6 pounds of lead per gallon?

A. Correct.

Q. Is that 3.6 pounds of pure lead?

A. It is made up of 20 pounds of lead carbonate in the gallon and the other 1.6 pounds of lead is made up of the lead content of the 50 per cent leaded zinc we use. I do not know whether you would call that pure lead, whether you would call lead sulphate the pure lead or not, but it would be in the sulphate class.

1408 Q. On your 101-X paint, Mr. Niedt, what is the weight of that per gallon?

A. It weighs approximately 18 pounds to the gallon.

Q. And the weight of your 101 Standard, what is that per gallon?

A. About 14½ pounds, if I remember correctly, 14 or 14½.

Q. So that the relative weight of the lead in each gallon of paint is a very small part of the total weight per gallon?

Mr. Wright: Your Honor, I object to that. I think the record shows plainly what the relation is.

Trial Examiner Norwood: Well, if the witness can tell us again, it is cross-examination.

A. In the later years as you know, the formulations of paint have changed. There was a time years back when we used very heavy quantities of lead in paint, and zinc, that was the basis of paint, it usually contained say approximately 60 or 65 per cent lead, or 70 per cent lead, 10 per cent zinc and 10 per cent extendor, and those were very heavy body paints, and naturally cost a good deal to produce; and in later years titanium dioxide and titanium pigments made their appearance on the market, changed our formulations to where it required less and less lead; and the amount of lead being used in paint today is gradually being decreased as time goes on as they improve the possibilities of titanium dioxide, and they are making strides in

1409 that direction, and the titanium dioxide that we get today of the routine type is the whitest pigment has ever been known and from the hiding standpoint of the pigment per pound it is the cheapest pigment you can buy. That accounts for the low percentage of lead in these paints today.

Mr. Wright: Your Honor, I move to strike the answer as not responsive to the question.

Mr. McDermott: I think it is very responsive and I think it is directly at issue.

Mr. Wright: Well, the question was as to whether there was a substantial amount of lead in the paint, and I do not believe that the dissertation on why that is the case is at all responsive to the question.

Trial Examiner Norwood: It goes to the direct examination, further explanation of it. Motion denied.

By Mr. Mc Dermott:

Q. Now, sir, can you tell us over how many years this gradual decrease in the percentages of lead in paint has been going on to your best recollection?

A. I think it goes back about ten or eleven years ago, when titanium pigment became in vogue. It started out first with titanium bearing pigments and titanium calcium pigments, and later on developments proceeded to where they made the titanium dioxide and sold it in separate form be-because they got it down to a price where you could afford to buy it. Originally it was very expensive, and as the price declined the use increased.

1410 Q. You spoke before of leaded zinc?

A. Yes.

Q. What is that, sir?

A. Well, leaded zinc is—you can buy it in various percentages, you can buy 35 per cent leaded zinc, you can buy 50 per cent leaded zinc, and you can buy as much as 70 per cent; some of the makers of that, I understand, even blend lead with which to produce that percentage of lead. The 70 per cent and 35 per cent and 50 per cent referred to, that is supposed to be the lead content of that mixture.

Q. That is what I was coming to; lead zinc is a mixture, is it not?

A. A mixture of zinc and lead.

Q. And the lead in it is the form of what?

A. I would say lead sulphate more so than lead carbonate.

Mr. McDermott: That is all.

Trial Examiner Norwood: Any further questions?

Mr. Wright: Yes.

Redirect Examination by Mr. Wright.

Q. Mr. Niedt, as I recall, you stated that approximately ten or eleven years ago a reduction began in the amount of lead pigments in outside paints?

A. Yes.

Q. You mentioned titanium dioxide, the appear-
1411 ance of that on the market as one of the reasons for the reduction?

A. That is right.

Q. Has the difficulty of obtaining lead pigments also contributed to that reduction?

A. No, because it is more difficult to obtain titanium pigments than it is to obtain lead.

Q. Who produces and sells titanium pigments in this area?

Mr. McDermott: Objected to.

Mr. DuBose: Objected to on the grounds it is immaterial. This man is not put up here to testify about any other company but his own.

Mr. Wright: Your Honor, it was brought out on cross that titanium dioxide was a pigment which was replacing lead in these outside white paints.

Trial Examiner Norwood: I think you have a right to go into that. Objection overruled.

Mr. DuBose: It is not within the amended complaint.

A. Well, it is being produced by the United Color and Pigment Company, DuPont and Titanium Pigment Corporation; and here locally it is being produced by the Titanium Pigment Corporation; but there are three factories to my knowledge that produce titanium pigment.

Q. Has the relative cost of titanium pigments and lead pigments had anything to do with the substitution?

A. Yes, that is why we made the change, because
1412 we got more hiding units per dollar by the use of titanium than we could get with lead.

Mr. Wright: No further questions.

Trial Examiner Norwood: Is there anything further?

Mr. McDermott: That is all.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Is there anything else?

Mr. Wright: No sir.

Trial Examiner Norwood: Well, what is your pleasure?

Mr. Wright: I would suggest that we recess until ten o'clock tomorrow morning, city time. That would be nine o'clock Central Standard Time.

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning, city time.

(Whereupon, at 2:15 p. m., July 29, 1946, the hearing was recessed until 10:00 o'clock a. m., July 30, 1946.)

1413

Room 516, U. S. Court
and Custom House,
St. Louis, Missouri.
July 30, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright and

Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N.W., Washington, D. C.), and

T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio), attorneys for Sherwin Williams Company.

Henry E. Gardiner, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N.Y.), attorneys for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and The Eagle Picher Sales Company.

Eugene Z. DuBose and William R. McDermott, (Alexander & Green, 120 Broadway, New York, N.Y.), attorneys for the National Lead Company.

1414 John A. Duncan (1649 Union Commerce Building, Cleveland, Ohio), for the Glidden Company.

1415 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment yesterday, the hearing in Docket 5253 reconvened for taking further testimony at 10:00 a.m., City time, at 9:00 o'clock standard time, July 30, 1946, in Room 516, the Federal Court House Building, St. Louis, Missouri.

Appearances are as follows:

Joseph Wright and Paul H. Dixon appearing for the Federal Trade Commission.

J. T. Welch and T. J. McDowell for Sherwin Williams Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Eugene Z. DuBose and William R. McDermott appearing for National Lead Company.

John A. Duncan appearing for the Glidden Company.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Waters, will you take the stand?

Trial Examiner Norwood: This is D. E. Waters.

D. E. WATERS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

1416 By Mr. Wright:

Q. Mr. Waters, will you state your full name, and address?

A. Dudley E. Waters, 508 West Drive, University City.

Q. What is your business occupation, Mr. Waters?

A. I am Vice-President of St. Louis Surfacer and Paint Company and manager of the operations.

Q. How long have you been in that position with the St. Louis Surfacer?

A. Two years.

Q. What was your occupation prior to that?

A. I was with the government for a year, the War Food Administration prior to that.

Mr. McDermott: We are having difficulty hearing the witness.

Trial Examiner Norwood: Speak a little louder.

A. Then thirteen years with Benjamin Moore and Company in the sales department, five years with the DuPont Company prior to that.

Q. What was your occupation with the Benjamin Moore Company?

A. Salesman.

Q. Selling what?

A. Paints and varnishes.

Q. Were you also connected with the paint business in your service with DuPont?

1417 A. Yes.

Q. Will you describe the business of the St. Louis Surfacer Company?

A. We manufacture a complete line of trade sales paints and a number of industrial products.

Q. How long has the company been engaged in that business, do you know?

A. Forty-three years.

Q. What paints now sold by the St. Louis Surfacer Company contain lead pigments?

A. Principally our outside white paint and interior primers.

Q. Will you state the formula, if you recall it, of the outside white paint?

A. You mean as it is being made today or prior to the war?

Q. Well, will you state how it is being made today?

A. At the present time it is being made with leaded zinc and titanium and asbestos.

Q. Has the formula of St. Louis Surfacer for outside white paint contained within the last few years, say since 1940, any appreciable amount of lead carbonate?

Mr. McDermott: That is objected to on the ground that this witness was not with the St. Louis Surfacer Company at that time. He is therefore not in a position to know; anything he testifies to is absolutely hearsay.

Mr. Wright: I will withdraw that.

1418 Trial Examiner Norwood: This witness may testify of his own knowledge about this matter. He doesn't have to belong to any particular company in order to know that if he is in this business and was in this business at the time he found it out.

Mr. McDermott: I believe, sir, the question was directed to what this particular company did in years gone by.

Trial Examiner Norwood: Oh, well, wait a minute.

Mr. McDermott: If I understood the question correctly.

Trial Examiner Norwood: That is a different question.

Mr. Wright: I will withdraw the question, Your Honor. I want to lay a little further basis for it.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Mr. Waters, did you say you are Vice-President and General Manager of the operations of the St. Louis Surfacer?

A. Yes, sir.

Q. And you have been for two years, did you say?

A. Yes, sir.

Q. In that time have you become familiar with the affairs of the St. Louis Surfacer?

A. Yes.

Q. Over what period of years?

A. I have analyzed their operations in the past 1419 fifteen years to a great extent.

Q. Do you know the formulae of the various paints which St. Louis Surfacer has produced over that period of time?

A. Yes.

Mr. McDermott: That is objected to on the ground that the witness cannot know.

Trial Examiner Norwood: He can certainly ask him if he knows it.

Mr. Wright: Your Honor, I did ask him if he knew it and he answered yes.

Mr. McDermott: May I cross-examine the witness on that, sir?

Trial Examiner Norwood: Yes, when the time comes. Objection overruled. He simply asked him if he knows.

Mr. McDermott: And the answer—

Trial Examiner Norwood: (interposing) and the answer was yes. You can cross-examine, that is what cross-examination is for.

Mr. McDermott: I think we all realize that there is going to be another question immediately.

Trial Examiner Norwood: Yes, that is right.

Mr. McDermott: As to what the formula is. Now, I think if we can demonstrate that this witness is saying he knows is mistaken and that he cannot possibly know, that then that answer to the subsequent question will be rendered valueless.

Mr. Wright: Your Honor, this is obviously a matter
1420 for cross-examination.

Trial Examiner Norwood: That is true, that is right. Proceed. Objection overruled.

Mr. McDermott: Exception.

By Mr. Wright:

Q. Mr. Waters, are the various formulae for paints of the St. Louis Surfacer Company a matter of record with that company?

A. Yes.

Q. Does the company maintain records showing what those formulas have been?

A. Yes.

Q. Have you examined those records?

A. Yes.

Q. Are you familiar with those records?

A. Yes.

Q. Will you state the formula of the outside white paint that was marketed by St. Louis Surfacer in a period around 1940?

Mr. McDermott: That is objected to on the ground that the witness is testifying as to what his recollection is of a particular record he has examined. His recollection is not the best evidence.

Trial Examiner Norwood: The witness may not answer that question unless he can answer it from some
1421 knowledge that he has obtained outside of the record, until you show the nonavailability of the records themselves. If it is a matter of record you will have to bring the record in. Objection sustained.

By Mr. Wright:

Q. Mr. Waters, you stated that the present formula of the St. Louis Surfacer Company contained as a pigment zinc oxide and titanium oxide?

A. Yes, sir.

Q. During the period of your service with the company, has it produced or marketed an outside white paint containing lead carbonate?

A. Yes, sir.

Q. What was the formula of that paint?

Mr. McDermott: Just a moment. I object unless it be shown that the witness knows the formula of his own knowledge and not from examination of the records.

Mr. Wright: Your Honor, he is the Vice-President and General Manager of the operations.

Trial Examiner Norwood: He may answer, the question isn't directed to his knowledge. Objection overruled.

A. I can't give you the exact formula. I can give you an approximate percentage of the white lead pigment.

Q. Will you give us that approximate percentage, then?

A. About 45%.

1422 Q. 45% is the weight of the paint, to the weight of the paint?

A. 45% of the pigment by weight.

Q. Well, what was the percentage of the pigment to the vehicle, approximately?

A. Approximately 60%.

Q. Do you recall how many pounds of basic carbonated lead would go into a gallon of that paint? Approximately?

A. Approximately 300 pounds, —oh, I mean in a batch. I am speaking of a 60 gallon batch.

Q. In a 60 gallon batch?

A. Yes. It would be about five pounds to the gallon.

Q. You stated that the present outside white paint does not contain lead carbonate. What is the reason you do not presently produce an outside white paint containing lead carbonate?

Mr. McDermott: That is objected to on the ground it is immaterial, irrelevant and incompetent, a conclusion of the witness.

Trial Examiner Norwood: Objection overruled.

A. The supply is not adequate.

Q. Does the St. Louis Surfacer and Paint Company have any plan for marketing an outside white paint containing lead carbonate?

A. Yes.

1423 Q. Will you state over what areas, geographical areas St. Louis Surfacer markets its outside white paint?

A. Principally the states south of St. Louis; Arkansas, Louisiana, Tennessee, Kentucky, Mississippi, Texas, Oklahoma, and Kansas. Did I mention Arkansas?

Q. On what price basis do you sell these outside white paints?

A. F.o.b. St. Louis.

Q. Is freight added?

A. No.

Q. From St. Louis?

A. No.

Q. Do you allow the freight on the invoice to the customer?

A. No.

Q. Does the customer pay the freight?

A. That is right.

Q. Is that all sold on the same price basis, the same list price?

A. Yes.

Q. From what suppliers does St. Louis Surfacer purchase lead carbonate when it can purchase it?

A. National Lead Company, Houston Lead Company, Eagle-Picher.

Q. Is St. Louis Surfacer solicited by all three of those producers for its business?

A. Yes.

Q. Has St. Louis Surfacer entered into contracts 1424 with these producers of lead pigments covering their purchases of lead pigments?

A. Yes.

Q. Will you estimate the annual amount of dry white lead both basic sulphate, basic carbonate which are normally purchased by St. Louis Surfacer?

Mr. McDermott: That is objected to on the ground the witness has already stated that they are not now putting out a white lead paint.

Mr. Wright: Your Honor, I asked if he knew how much is normally purchased on an annual basis by St. Louis Surfacer. If he knows I think he should be permitted to answer.

Mr. Wood: I object to that question, Your Honor, as indefinite in this sense, normal purchase doesn't mean anything. He should specify the period.

Trial Examiner Norwood: I shall overrule the objection and ask the witness to answer that as based on his own knowledge and experience.

A. Approximately 40,000 pounds.

By Mr. Wright:

Q. Is that on an annual basis?

A. Yes.

Q. It is my understanding, then, that your outside white paint is sold on an f.o.b. St. Louis basis?

A. That is right.

1425 Q. With the customer paying the freight to the market. Is the factor of freight rates involved in shipping such paints to these markets in Arkansas, Louisiana, Kansas, Kentucky, Mississippi, Texas and Oklahoma important in determining whether you can compete in those markets?

Mr. Du Bose: I object to that as immaterial.

Trial Examiner Norwood: Overruled. Answer the question.

A. Yes.

By Mr. Wright:

Q. In those markets do you meet competition from paint manufacturers who are located in those markets?

A. Yes.

Q. Do you sell outside white paint in Fort Worth, Texas?

A. Yes.

Q. Are you familiar with the Fort Worth Paint Company?

A. In a general way.

Q. Is that a competitor of St. Louis Surfacer in that market?

A. Yes.

Q. As to that paint?

A. Yes.

Q. Do you compete in the Kansas City area?

A. Yes.

Mr. McDermott: Will you keep your voice up, 1426 please. We can't hear you.

Trial Examiner Norwood: Yes, speak a little louder.

By Mr. Wright:

Q. Are you familiar with the Missouri Valley Paint Manufacturing Company of Kansas City?

A. Yes.

Q. Are you familiar with the Sewall Paint and Varnish Company of Kansas City?

A. Yes.

Q. Are you familiar with the Anthony Manufacturing Company of Kansas City?

A. No.

Q. Are Missouri Valley and Sewall competitors of yours in the Kansas City area?

A. Yes.

Q. Do you compete in the Omaha area?

A. No.

Q. I believe you stated you competed in the New Orleans area?

A. Yes.

Q. Are you familiar with the Mississippi Valley Paint Company in New Orleans?

A. Yes.

Q. Is that company in competition with you in that area?

A. Yes.

1427 Q. Are you familiar with the True Tag Paint Company of Memphis?

A. Yes.

Q. Do you sell in the Memphis area?

A. Yes.

Q. Is that company a competitor of yours in that area?

A. Yes.

Q. Now, Mr. Waters, you stated that you were in competition with these various concerns in these distant areas. Is the matter of price that you charge for your outside white paint in these markets in normal times of importance in determining whether you get the business or your competitor?

Mr. McDermott: I object, first, to the question on the ground that the use of the expression "in normal times" is too indefinite. I think that there should be some year or years to eliminate that objection to the question. I also object on the ground that this witness has not been with the St. Louis Surfacer Company more than two years and it is a matter of common knowledge that we have not had normal times during these two years and that the witness is therefore incapable of answering.

Trial Examiner Norwood: If this witness has a background in this business that would familiarize him with the methods of pricing and methods of competition he might answer it, but I don't believe you laid the grounds;
1428 have you laid the grounds for that?

Mr. Wright: I think perhaps I can lay the grounds for that in one or two more questions.

Trial Examiner Norwood: Go ahead.

Mr. Wright: I will withdraw the pending question.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. You stated that you had been with the Benjamin Moore Company and with the DuPont Company for thirteen or fourteen years?

A. A total of approximately eighteen years in selling paint.

Q. Eighteen years. Now, in what market areas were you engaged as a salesman of paint?

A. In the Kansas City area and the St. Louis area.

Q. Now, on the basis of your experience as a salesman in those areas, is the price quoted in normal competitive times on outside white lead paint important in determining who gets the business?

A. Very much so.

Q. Would a differential of a few cents per gallon in comparable outside white paints determine the business?

Mr. DuBose: I object to the question on the ground it is indefinite, "a few cents".

Mr. McDermott: And also on the ground it is a 1429 matter of opinion. He hasn't been asked as a matter of opinion. This is an expert now.

Trial Examiner Norwood: Well, I think this man, it is a matter of competition based on his extended experience here.

Mr. Wright: The question related to his experience and was followed by a—

Trial Examiner Norwood: (Interposing.) Objection overruled.

Mr. DuBose: Both objections?

Trial Examiner Norwood: Yes, both objections overruled. Answer the question.

The Witness: Will you repeat the question?

Mr. Wright: She will read it for you.

(Reporter read the last question.)

A. Yes, in many instances.

By Mr. Wright:

Q. You stated that the matter of the freight rates paid in shipping outside white paint to the markets, more distant markets in which St. Louis Surfacer sells is important in determining whether it can compete. If St. Louis Surfacer Company could obtain basic carbonate of lead on a basis of five cents per gallon of paint in material cost cheaper than the competitors located in Texas, in Memphis

and in New Orleans, would that affect the ability of St. Louis Surfacer to compete in those markets?

1430 Mr. McDermott: Just a moment, may I have that question read, sir?

Trial Examiner Norwood: Yes, read the question.

(Reporter read the last question.)

Mr. DuBose: Same objection as we made yesterday on the ground that it is a factual—the witness is not expert.

Mr. Duncan: We move that the first part, the statement of Mr. Wright go off the record. That is not a question. We object to the latter part of the question on the ground of immateriality and irrelevancy.

Trial Examiner Norwood: The objection is overruled and the motion denied. Answer the question. Do you want it read again?

The Witness: I believe I do.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Would a saving of five to ten cents per gallon in material costs result in St. Louis Surfacer extending its competitive position in distant markets?

A. Yes.

Q. Mr. Waters, in your experience with St. Louis Surfacer, has any corroder of lead at any time offered your company any more favorable prices or terms and conditions of sale than any other corroder of lead at the same time?

A. No, sir.

1431 Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examination.

Mr. DuBose: May we have a short recess?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

1432 Mr. McDermott: Shall we proceed.

Trial Examiner Norwood: Yes.

Cross-Examination by Mr. McDermott.

Q. With what agency of the government did you say you were, sir?

A. War Food Administration, fats and oil branch.

Q. What was your position with them?

A. In charge of the allocation of the drying oils.

Q. Now, you spoke before about the content of lead carbonate in a gallon of paint?

A. Yes.

Q. When was the last time your company manufactured such a paint with lead carbonate in it?

A. With the percentage that I gave or—

Q. (Interposing.) Well, the last time that they made a paint with lead carbonate.

A. Within the last year.

Q. You say it was about a year ago?

A. No, I would say it was within six months.

Q. Now, did I understand you correctly to say that there were five pounds per gallon of lead carbonate in that paint?

A. Yes.

Q. How much leaded zinc was in it?

A. None in the one I was speaking of.

1433 Q. When was that particular paint made by your company?

A. '43.

Q. That was before your connection with the company?

A. Yes.

Q. And upon what did you base that testimony with respect to the content of that particular paint?

A. Our master formula and our production slip.

Q. In other words, you based it on a record which you saw?

A. That is right.

Mr. McDermott: I move to strike out, sir, that portion of the witness' testimony upon the grounds that it is not the best evidence. It is clearly hearsay, based upon records which are in existence and which are the best evidence.

Mr. Wright: Your Honor, I submit that the motion should not be granted. In the first place the question that has been asked related only to the production. It had nothing to do with the marketing or the handling or the billing of that paint.

Trial Examiner Norwood: Well, this formula you are talking about, did you work with that formula and follow it? And verify these—

Mr. McDermott: The witness has said, sir—

Trial Examiner Norwood: (Interposing.) Let me see what his statement was based on.

The Witness: Based on our records of our master
1434 formula that was followed, and the production slips of production at that period.

Trial Examiner Norwood: Well, what do you know about whether or not it was followed, about the result that they procured from the formula?

The Witness: Well, all of our production slips and master formulas, of course, are a matter that we have on all products and our production department follows those formulas till some change is made, then we make a different master formula.

Trial Examiner Norwood: Can you testify of your own knowledge that this paint was made according to the formula?

The Witness: Could I testify that it was?

Trial Examiner Norwood: Yes.

The Witness: Yes.

Mr. Wright: Your Honor, this witness has stated already on direct examination that the reason that formula is not followed now is simply because they can't get the lead carbonate to produce that paint and that the company at this time plans to market that whenever such lead carbonate is available to them. He is the manager of the company; certainly he should be permitted to testify as to the business of the company.

Mr. McDermott: Is there some mystery about this formula that you won't produce it? Why don't you
1435 produce the formula? It is only a slip of paper. Maybe it isn't five pounds to the gallon.

Mr. Wright: Your Honor, this is an executive of the company that is in charge of the operations of the company. Certainly his sworn testimony as to those operations should be good evidence, competent evidence.

Trial Examiner Norwood: I shall deny the motion. Go ahead.

Mr. Wright: May I state I believe your ruling first went to a question which related to the contents of documents?

Trial Examiner Norwood: I understand that. That is correct.

Mr. McDermott: I should like to enlarge a bit, sir, on what I was about to say.

Trial Examiner Norwood: Yes.

Mr. McDermott: That was exactly what you ruled on, the contents of records. Now, this man has said this paint was last made in 1943. He was not with the company then. The formula is something that he looked at this morning or yesterday, and he is testifying here today upon what that

formula contains. Now, sir, if we are to be consistent, and if this record is to present a logical scheme with respect to the admissibility of this type of evidence, I think that your Honor should rule likewise with respect to this formula.

Trial Examiner Norwood: Here is a formula which 1436 this man has used.

Mr. McDermott: No, sir, he didn't. It was made last in 1943. He wasn't with the company. He couldn't have used it. That is my point.

Mr. Dixon: Your Honor, this witness said in answer to cross-examination that the formula that was formulated in '43 was being sold as late as six months ago, and that was his answer.

Mr. McDermott: He wasn't asked the question and he didn't say.

Mr. Dixon: That was his inference.

Trial Examiner Norwood: As I understand it, he is testifying about formulae that he has used or superintended the use of since he has been with this company, am I correct?

The Witness: Part of it was. I said we had used some carbonate lead within the last six months. The question was asked, whether this five pounds to the gallon, when was it last used.

Trial Examiner Norwood: Yes.

The Witness: I was not with the company at the time that was used.

Trial Examiner Norwood: Yes. Well, I think I will sustain the objection on that ground.

Mr. McDermott: It was a motion to strike, sir.

Mr. Wright: Your Honor, may I state that we are 1437 not talking here about the contents of a document; we are talking about an integral part of a company's paint business. This is not a contents of a document. This is about a product which this company, this witness has stated, sold up to 1943 and which it has not since been able to sell for the simple reason that it has not been able to procure the materials, and the witness has stated that the company presently plans to market exactly that formula whenever it can obtain the materials. In other words, the document itself isn't important. It is the formula.

Mr. McDermott: Why don't you bring the document here? What is the mystery about it?

Trial Examiner Norwood: Now, it is this way: If he

is directing the question to showing the contents of those documents, I should not permit the question to be answered, but if the question is directed to his practice in the formula that he follows and has followed with this company, and which he recollects, why, I should let him state that regardless of the fact that it is in writing somewhere. I think there is the line that we draw. Now, this situation here is rather hazy and I don't think that the Commission should base its case on statements like this when it can get better evidence.

Mr. Wright: Well, your Honor, we are not talking now about a contract or a deed. We are talking about a business practice of this company. The word "record"
1438 was never brought into it until he stated that there were records of the company which also contain this information.

Mr. McDermott: We are talking about a formula.

Mr. Wright: We are talking about a type of paint which this man testifies he knew the company, he is now chief executive of marketed up to 1943, which it would now be marketing if it could obtain the materials, and which it intends to market as soon as those materials are available, and it doesn't seem to me the best evidence ruling referring to documents should be applicable to that point. Now, if this question were—

Trial Examiner Norwood: (Interposing.) Wait a minute, now. If you can have your witness to speak of his own knowledge, based on his experience about these things as to this paint ~~being made~~ according to certain formulae, and he knows what that mixture is independently of the formulae, why, you have him tell it. But I think the matter is in a satisfactory condition.

Mr. McDermott: If your Honor please, to straighten the record—

Trial Examiner Norwood: (Interposing.) Yes.

Mr. McDermott: (Continuing.) —perhaps Mr. Wright and I can agree to the facts upon which we feel your ruling should be based to eliminate any haziness.

Trial Examiner Norwood: Do you think we can
1439 do that, Mr. Wright?

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: May we go back on the record?

Trial Examiner Norwood: Yes.

Mr. Wright: Your Honor, in view of the objection, I have discovered that the witness has the original formula in his possession, and I would like to ask that it be read into the record.

Trial Examiner Norwood: You identify your paper there.

Mr. Wright: Yes. Mr. Waters, do you have the original business records showing the formula of the outside white paint about which you were testifying?

The Witness: Yes.

Mr. Wright: Is this the paper?

The Witness: Yes, that is the master formula.

Mr. Wright: By agreement of counsel, I would like this formula read into the record showing the formula of the outside white paint about which you have been testifying. Is that satisfactory with counsel for the respondents?

Mr. McDermott: Yes, and if there is anything in the way of a trade secret in connection with it, we don't expect you to disclose it.

1440 The Witness: As long as we give the pigment content, we don't need to worry about it.

Mr. McDermott: And give us the amount of oil.

Mr. Wright: Mr. Waters, may I ask you, under this column headed "Pounds", the figures .07½, then at the end the figures 1.31, what does that figure 1.31 represent?

The Witness: Raw material cost.

Mr. Wright: Raw material cost. Now, on the column headed "Pounds" at the extreme right, there is the figure 1.64.

The Witness: That is raw material cost.

Mr. Wright: Is that in dollars, $1.64?

The Witness: Yes, that is right.

Mr. Wright: And $1.31?

The Witness: January, 1944.

Mr. Wright: And that is based on the seven and a half price of lead and the eight and a half price of lead carbonate?

The Witness: Sixty gallon batch formula of outside white lead and zinc paint, 397 pounds of carbonate of white lead, 99 pounds of sulphate white lead, 264 pounds of zinc oxide, 7 and 9/16 pounds inert pigment—do you want the liquid portion?

Mr. McDermott: Generally, yes.

The Witness: Sixteen gallons raw oil, 22 gallons of
1441 bodied linseed oil, approximately 6 gallons of—ap-proximately 10 gallons of dryers and mineral spirits. Is that all right?

Mr. Wright: Mr. Waters, may I ask one more question? The figure .06¾ on the line L 103, does that represent the price of basic sulphate?

The Witness: That is right.

Mr. Wright: And the figure .07½ on the same line, the later price of lead sulphate?

The Witness: Yes, sir, that is right.

Mr. Wright: Thank you.

By Mr. McDermott:

Q. In connection with the dryers and mineral spirits, did you intend to convey that there were two items of six gallons and ten gallons or a total of ten?

A. Total of ten.

Q. What is the weight of that paint per gallon, Mr. Waters?

A. Approximately seventeen pounds.

Q. Who are your competitors in the sale of outside white paint, your chief competitors?

A. Chief competitors in outside white paint, you are considering our whole trade area that we are operating it?

Q. Yes.

A. True Tag in Memphis, Peasley Gulbert in Louisville, Sewell in Texas, Cook in Texas, Cook in Kansas City, Sewell in Kansas City, Wagner Paint Company in Kansas City.

1442 Q. Do you compete with the Mound City Paint Company?

A. Yes, sir.

Q. In those places, in the general trade area that you sell in?

A. Yes.

Q. That is the company that Mr. Casey is connected with, is that correct?

A. Yes, sir.

Q. Do you know Mr. Casey?

A. Yes, sir.

Q. Do you compete with the Vane-Calvert Paint Company?

A. Yes, sir.

Q. In your general trade area?

A. Yes, sir.

Q. And that is the firm that Mr. Haddock is connected with?

A. I don't know Mr. Haddock.

Q. Does your company compete with the Steelcote Paint Company?

A. To a certain extent.

Q. That is the firm that Mr. Niedt is with. Do you know him?

A. Yes.

Q. Now, did I understand you correctly to say that you sold your paint f. o. b. St. Louis?

A. Yes.

1443 Q. Do you know how the Vane-Calvert Company sells its paint?

A. No.

Q. Don't you know how your competitors sell their paints?

A. You say how they sell it? I don't know what you are talking about.

Q. Well, do you know whether Vane-Calvert—

Mr. Wright: (Interposing.) Your Honor, I don't see the purpose of this question. I don't see its relevancy.

Mr. McDermott: You will.

Trial Examiner Norwood: This is cross-examination. He can ask questions to test the witness' knowledge, and that is what this question was directed to. Did he answer that?

Mr. McDermott: Not yet, sir.

The Witness: I would like to have it clarified.

Mr. McDermott: Very well, I will clarify it for you.

By Mr. McDermott:

Q. Do you know that the Vane-Calvert Company sells its paints on a delivery price basis?

A. No.

Q. Do you deny it to be a fact that Vane-Calvert Company sells its paints on a delivery price basis?

Mr. Wright: Your Honor, I object. Whether the witness denies it or not is of no importance. He has already stated he doesn't know how Vane-Calvert sells its

1444 paint. It is an improper question.

Mr. McDermott: I will reframe the question.

By Mr. McDermott:

Q. Have you ever been informed that Vane-Calvert Company sells its paint on a delivery price basis?

A. No.

Q. Have you ever made it your business to ascertain upon what basis that company sells its paint?

Mr. Wright: Your Honor, I object to that question.

Trial Examiner Norwood: Wait a minute.

Mr. Wright: It is vague and indefinite and meaningless, "Have you ever made it your business to ascertain". The witness has already stated that he doesn't know, and that—

The Witness: Could I—

Trial Examiner Norwood: (Interposing.) Wait a minute. Objection overruled.

By Mr. McDermott:

Q. You were about to say something, Mr. Witness?

A. Could I make a statement regarding the question of competition in the paint business in the last two years as to why you would know the prices—

Trial Examiner Norwood: (Interposing.) The other side will give you a chance to do it, but just now answer his question.

1445 By Mr. McDermott:

Q. I am not asking the prices.

A. Oh, you are not asking about prices?

Q. I am asking about you sell f.o.b. St. Louis?

A. That is right.

Q. Now, as distinguished from the method by which you sell f.o.b., do you know that Vane-Calvert doesn't use that system of selling?

A. No, I didn't know that they didn't.

Q. Did you know that the Steelcote Company sells on a delivery price basis?

A. No.

Q. Did you know that the Mound City Paint Company sells on a delivery price basis?

A. Yes.

Q. You did know that?

A. Yes.

Q. Now, Mound City sells in the same general area in which you sell your paint, is that correct?

A. Yes, I would say it does.

Q. And Mound City absorbs the freight, correct?

A. To my understanding they do, yes.

Q. Do you know or have you any information as to the difference in the list price of your paint, your outside white paint, and the price of the Mound City outside white?

1446 A. In a general way only. I couldn't give you their prices, if that is what you mean.

Q. No, I don't expect you to be able to give us their prices.

(At the request of Trial Examiner Norwood, a remark made by counsel as part of the foregoing question was deleted.)

By Mr. McDermott:

Q. Being in competition with another paint manufacturer and seller, you have to make it your business to have some general idea of what your competitor is doing, don't you?

A. Yes, in normal times.

Q. Yes, and, of course, today it is not what we call normal times?

A. That is right.

Q. It is a seller's market, is it not, if you had the product to sell?

A. That is why I am not as familiar with the competitive situation because it isn't necessary that you be familiar with it. The important thing is getting the material to them.

Q. Right. Well, generally speaking, what is the distinction in the list pricing of your product, your outside white, and the Mound City?

Mr. Wright: May I have that question read, please?

Trial Examiner Norwood: Read the question.

(Reporter read the last question.)

1447 Mr. Wright: Your Honor, generally speaking, that is a very vague and indefinite question.

Trial Examiner Norwood: I think it calls for a very general answer. Let him answer.

A. List pricing don't mean anything in the paint business.

By Mr. McDermott:

Q. Will you enlarge on that?

A. It is net prices that count. There are a lot of discounts given from time to time that you can't necessarily go by a list price as being a competitor's selling price.

Q. You mean there are price cutters in the—
A. (Interposing.) In the paint business, oh, yes.
Trial Examiner Norwood: Go ahead.

By Mr. McDermott:

Q. Is there a general elevation in the price of the Mound City outside white sold on a delivery price basis over the price of your outside white which is sold on an f.o.b. St. Louis basis?

A. I would like for you to clarify that question. You say is there a general elevation?

Q. Yes. Is there price, their list price higher than yours?

A. I don't know.

Q. You don't even know generally speaking?

A. I wouldn't know what their price list was generally speaking.

1448 Q. Well, now, you sell your paints, I believe you said, in Arkansas, Louisiana, Tennessee, Kentucky, Mississippi, Texas, Oklahoma and Kansas, is that correct?

A. I didn't mention Missouri, did I?

Q. Well, no, you didn't, and I assume you sell in Missouri also?

A. Yes.

Q. And on your sales to all of those destination points, you sell f.o.b. St. Louis?

A. That is right.

Q. And in what quantities do you sell your paint, per hundred gallons or—

A. (Interposing.) Sometimes in carloads; sometimes in whatever quantity they care to buy. There is no definite, fixed amount schedules.

Q. Well, isn't there some unit that you generally regard as the sales unit, whether it be ten or fifty or a hundred gallons as a—

A. (Interposing.) No.

Q. Now, you also testified, did you not, Mr. Waters, that a difference of five to ten cents in your production costs per gallon would enable you to extend your competitive area?

A. That is right.—

Q. Is that correct?

A. Yes.

1449 And by production costs, I assume you meant the cost of your container, the cost of your labor, the cost of your raw materials, is that correct?

A. It is all considered your cost of your product, your finished product.

Q. Would a saving of two cents per gallon enable you to extend your competitive market area?

A. Well, that would depend a great deal on the competitive situation existing at the time.

Q. I assume you had those factors in mind when you answered Mr. Wright's question, is that not so?

A. Yes.

Q. Well, keep the same factors in mind in answering my questions, if you will.

A. I would say that it would make a difference.

Q. A two cents a gallon saving would make a difference?

A. Yes.

Q. And when you say that such a saving would enable you to extend your competitive market area, exactly what do you mean by that?

A. I mean by that that outside white paint is the most highly competitive item in the paint line; your margin of profit is less in that product than any product you have. As a result, a difference of two cents would make a difference of a profit or loss in the number of cases in
1450 selling a gallon of the paint at a distant point.

Q. Do you mean to convey by your answer that two cents' difference would enable you to go seeking new customers at more distant points?

A. It would keep us from getting business if we weren't competitive at those points.

Mr. McDermott: Will you read that question, please?

Trial Examiner Norwood: Read the question.

The Witness: Frankly, I don't understand the question.

Trial Examiner Norwood: Would the two cents enable you to be competitive at some points, the two cents' margin, where you would otherwise not be able to compete?

The Witness: Yes, it would.

By Mr. McDermott:

Q. And it would enable you to do that because it would mean the difference between a profit and a loss, is that correct?

A. Yes.

Q. Now, in other words, you would offer your paint to the customer at a price two cents below the price you had previously offered it at?

A. Could I get that question clarified? You mean in order to get more distant market would we have to offer a price lower by two cents in order to get into that market?

1451 Q. I am trying, sir, by asking that question to obtain a clarification of your preceding answer.

Mr. Dixon: Would you read the question again?

The Witness: Will you read it again, please?

(The reporter read the question.)

Trial Examiner Norwood: Can you answer that?

The Witness: I can't answer that.

By Mr. McDermott:

Q. Now, I am going to put it to you concretely, Mr. Wafers. Let's assume that up to today you have been manufacturing a gallon of your outside white paint at a production cost of $1.65. Let us assume that you have been offering that paint to your customers at $2.00 per gallon, but it is also assumed that as of today you achieve a saving in production costs that brings your production cost per gallon down to $1.63; now, what effects will that have on your business, and I want you to enumerate them for me and go into detail?

A. You want that at present conditions?

Q. No, never mind present conditions, give it to me in normal times.

A. Normal times. The question of saving two cents a gallon on the raw material cost of a gallon of paint, a gallon of outside white paint, you are talking about?

Q. Yes, sir, that is what we are talking about.

A. Would represent—

1452 Q. (Interposing.) Now, please, Mr. Waters.

Trial Examiner Norwood: Let him answer.

Mr. McDermott: I don't want him to theorize, sir.

Mr. Wright: He asked for all the effects of the business, your Honor. Now, he gets a narrative answer.

Mr. McDermott: The effects on his business.

Trial Examiner Norwood: Let him answer.

A. Would represent the difference between a profit and a loss on a gallon of paint.

By Mr. McDermott:

Q. Is that your answer?

A. It would—yes, that is my answer.

Q. I am going to ask the reporter to read my question to you again and ask you to please answer it.

(Reporter read the question.)

A. Well, the first effect, I mentioned it was a question of profit and loss; that is relevant, isn't it?

Trial Examiner Norwood: Well, yes, that is all right, but he asked you for the details of the effects of this production.

The Witness: It is the only effect.

Trial Examiner Norwood: You might tell us how that would change the price and then how that would enable you to go into a little further territory, might bring in the freight—you asked him for the details; that is not
1453 satisfactory to the counsel?

Mr. McDermott: Oh, sure it is.

The Witness: Well, after all, we are operating a business for a profit and the first effect is the question of whether he is going to make a profit or loss in the operation of a business. If we are losing money on a product, we certainly aren't going to cut a price if we save two cents.

1454 Q. Mister, please; I gave you concrete figures. Now, you testified in response to an earlier question of mine on whether the saving on production costs would enable you to extend your market area. Now, I have given you an illustration. Now, please state more in detail exactly what effect that 2¢ saving is going to have.

A. It would put us in a more competitive position with the price of our merchandise.

Q. Never mind the economics books; give us facts; give us some business practice, and forget the theory.

Trial Examiner Norwood: Well, I think he has answered that question clearly. His answer has been responsive.

Mr. Wright: Your Honor, the question related to a whole business, spread out over his whole territory, and didn't relate to any particular market or any particular time. I think it called for a vague answer.

Trial Examiner Norwood: Well, you will have to amend that question. I think that question is apparently superfluous.

By Mr. McDermott:

Q. Is that, sir, the best answer you can give me to my question?

A. As you have put it to me, yes.

Q. Well, what would be the effect of that 2¢ sav-
1455 ing in production costs from $1.65 to $1.63 upon your competitive market price?

Mr. Wright: Your Honor, just a moment, now. Counsel is putting "production costs" in the witness's mouth by that question. He hasn't established there was any $1.65 cost at any normal competitive time.

Trial Examiner Norwood: I think it is his privilege to put that conception in the witness's mind and seek his reaction on it. Objection overruled.

A. With the lower cost, we would more aggressively sell an item that showed us a better margin of profit, and we could go into markets that we were not able to go in with a higher cost.

By Mr. McDermott:

Q. In other words, sir, you would regard that 2¢ saving in production costs as a profit? Right?

A. Yes.

Q. And you would not lower your price?

A. That, again, depends upon the situation existing.

Q. I have given you the situation.

A. All right, we would lower the price if you say it is in normal times.

Q. I told you that. I asked you to assume that.

A. All right.

Q. So, you would lower your price?

A. Yes.

1456 Q. How much would you lower your price?

A. I would say we would lower it the 2¢.

Q. So, you wouldn't have any profit?

A. Other than increasing our volume, which would represent profit.

Q. All right; so that now you have eliminated that 2¢ as a profit as such and you have cut down your price from $2.00 to $1.98; right?

A. Yes.

Q. All right; now, what is the effect of that?

A. It is going to cause us to get increased volume of business.

Q. Where are you going to get the increased volume of business?

A. Well, that is in our trade territory.

Q. In what trade territory?

A. The one that we have mentioned, the States in which we do business.

Q. You would not go to any new territory?

A. There are a lot of points in those States which we do not reach at the present time.

Q. And what is the reason for your not reaching them at the present time?

A. At the present time it is due to the lack of materials. We haven't sufficient production.

1457 Q. So that your saving in production costs wouldn't have anything to do with that?

A. If you are dealing with present times, no.

Q. Well, will you forget present times?

A. I can't.

Q. Well, I don't blame you for that.

A. Well, it is such an important thing in answering any question regarding competitive conditions that we just can't consider it from any other angle.

Q. Well, the only competition today is the competition in the manufacture of raw materials?

A. That is right.

Q. Now, we have settled that; let's try and regard this as the normal times proposition entirely and forget the unusual and abnormal today situation.

A. You did ask me, though, at the present time what would we do.

Q. Well, when I am asking you those questions I don't mean today, I mean normally. Now, having reduced your price 2¢, what is the effect of the price reduction on the trade area?

A. It would put us in a position to be more competitive with the manufacturers located at those distant points.

Q. What would be the factors that would enable you to compete with manufacturers located at more distant points?

A. One important thing is price. The other is 1458 quality of merchandise. Service is another.

Q. Now, is it your concept that for a 2¢ per gallon saving in price a distributor or a retailer is going to switch from one product to another?

A. No, I wouldn't say he would switch for 2¢ a gallon, but he wouldn't be able to get some business if he was higher priced than his competitors in that area.

Q. And you are not selling to the public, are you, you are selling to retailers and distributors?

A. Distributors, yes.

Q. So that the retailer or distributor wouldn't switch from one line of paint to yours for a 2¢ a gallon saving?

A. I couldn't answer that.

Q. Well, you have already said "no"?

A. Well, normally I would say "no", that is right.

Q. Would a 3¢ per gallon savings cause a retailer or distributor to switch from one line of outside white to another?

A. No.

Q. Would 4¢?

A. It would get him thinking, and at 4¢, possibly he would be on the fence at 4.

Q. At 5¢?

A. I would say that 5¢ would be the difference of getting it and not getting it.

Q. 5¢ per gallon?

1459 A. Yes.

Q. Now, would 3¢ make that difference if it were a saving just in outside white and wouldn't affect the whole line of the manufacturer?

A. It would have quite a bearing on it, in view of the fact that outside white paint is the main item in any paint line and you must be competitive in that field in order to sell the rest of your line. It is the first thing that a customer wants to know, is how much is your outside white, what is the formula; and that oftentimes makes the difference of whether you sell him your complete line or not.

Trial Examiner Norwood: Is that used as the basis for price comparison between different lines?

The Witness: Yes.

By Mr. McDermott:

Q. Now, are you familiar with freight rates, generally, in the are in which you sell your products?

A. Not very much so, no; just in a rough way is all.

Q. Yes. But, you are generally or roughly familiar with them?

A. Very roughly.

Q. Are there substantial differences in the freight

which your various customers have to pay for your products?

A. Yes.

Q. What is the greatest difference, we will say,
1460 between a customer located 25 miles from St. Louis and a customer located in Kansas, what is the difference in freight costs between those two customers?

A. This would have to be just a rough estimate on my part.

Q. Yes, and I haven't anything to check you with, so you are safe.

A. You are talking per gallon, then?

Q. Per gallon, or per hundred gallons, whichever way you are most familiar with.

A. I would say it would be a difference of about ten cents a gallon.

Q. Ten cents a gallon?

A. Yes; it is the average line of paints, of our paints.

Q. So that the customer in Kansas pays ten cents more freight?

A. Yes.

Q. Now, for the company, the Mound City Paint Company, that sells its paints on a delivered price basis, are you able to compete with them in Kansas?

A. We have for years.

Q. And yet there is a ten cent saving per gallon, or more, as between you and Mound City?

A. I couldn't say whether there was definitely or not. They may adjust their prices.

Q. They sell on a delivered price basis?

1461 A. Do they not have a zoning proposition where after so many miles they raise the price? A lot of companies do have that.

Q. A zone delivered price system?

A. Yes.

Mr. Wright: Your Honor, may I suggest a two minute recess?

Trial Examiner Norwood: Yes, two minute recess.

(A short recess was had.)

Trial Examiner Norwood: Did you complete your cross?

Mr. McDermott: Mr. Wood has a few questions, sir.

Mr. Wood: I want to look at the formula, please.

(Witness hands paper to counsel.)

By Mr. Wood:

Q. Mr. Waters, I believe you testified this was a master formula, is that right?

A. That is right.

Q. And I know that you read into the record certain of the proportions of materials, but I can't remember those, and I will ask you to state again for me the amount of lead pigments in a gallon of your house paint.

A. 396 pounds.

Q. In how many gallons?

A. In sixty gallon batch.

Q. And how many is that per gallon, can you make a calculation?

1462 A. That is the carbonate lead and sulphate lead combined. You said lead pigment this time. That would be over 6 pounds to the gallon.

Q. Of sulphate and carbonate?

A. Yes.

Q. And what percent is sulphate and what percent is carbonate?

A. 99 pounds of sulphate and 297 of carbonate.

Q. Now, you mentioned an inert pigment in there?

A. Yes.

Q. How much of that?

A. Approximately 8 pounds.

Q. Per gallon?

A. Per 60 gallon.

Q. 8 pounds?

A. Yes.

Q. Which was that you said 8 pounds of?

A. That is asbestin.

Q. Is there any other inert material in there?

A. What there is, there is 7-9/16 and I say approximately 8 pounds. I don't know what this 9/16 is. I know 7 pounds is asbestin and this 9/16 is an extender.

Q. Now, what is the 297?

A. That is a carbonate lead.

Q. What is the 264?

1463 A. Zinc oxide.

Q. Now, you call that a master formula?

A. Yes.

Q. Do they ever vary from that formula for individual batches?

A. When the materials were available it was made according to the formula.

Q. At all times, or did they vary it for different purposes?

A. Not this formula, no. We have another formula, if we were going to make a different type.

Q. In other words, you would have other formulae?

A. Yes.

Q. For house paints?

A. No, not for house paint. This was our standard formula for outside white paint.

Q. Did the company sell any other formulae for outside house paint?

A. They had second grade house paints.

Q. Did any of those contain lead?

A. Very little.

Q. Were they sold under the same name as to brand?

A. No.

Q. How were they distinguished?

A. They were sold under the Arlington label.

Q. And what were these sold under?

1464 A. Surfacer.

Q. What was the Arlington label?

A. What do you mean, what was it?

Q. I mean, was it a brand owned by the company, or private brand manufactured?

A. Brand owned by the company.

Q. Now, what percent of your business in this outside white house paint do you do in the St. Louis area?

A. What percent of our total volume of business we received in outside white house paint?

Q. Yes, in the St. Louis Area.

A. In the St. Louis area. When you say St. Louis area, do you mean metropolitan St. Louis?

Q. Yes. In other words, I am getting at this: In your total business in outside white house paint what percent is done in the St. Louis area?

A. What percent of our white house paint is done in the St. Louis area?

Q. That is right.

A. I would say about 40%.

Q. About 40%?

A. Yes.

Q. And 60% is done beyond the limits of the St. Louis metropolitan area?

A. Yes.

1465 Q. What are the farthest points to which you sell this outside white house paint?

A. Alexandria, Louisiana.

Q. To the south?

A. Yes.

Q. And do you ship by river?

A. No, by rail.

Q. How far west do you go?

A. Kansas. Do you want it in miles?

Q. Approximately.

A. Say 500 miles.

Q. And approximately how far north do you go?

A. Practically none at all.

Q. Not at all?

A. Yes.

Q. How far east do you go?

A. A couple of hundred miles.

Q. A couple of hundred miles?

A. Yes.

Q. Is that in Illinois and Indiana, or is it in Kentucky?

A. Oh, let's see; I forgot, that is southeast; I was thinking directly east. It would be considerably further if we took in Tennessee and Kentucky. It would be 600 or 700 miles.

Q. Six or seven hundred miles in Tennessee or Kentucky?

A. That is my guess.

1466 Q. Now, you testified on direct examination that a lowering of material costs would enable you to extend your competitive area, and I would like you to estimate just how far, let's say at 5¢ lowering of material cost would enable you to extend your competitive area, north, south, east and west?

A. That would be a difficult thing. 5¢, how much further? I would say that you would go about 300 miles at 5¢.

Q. In all directions?

A. I wouldn't know that. I am only trying to figure out what the freight would be on a gallon of paint for a given number of miles. That is something I am not in a position to compute right here.

Q. Well, you say you don't sell to the north anyhow?

A. That is right.

Q. Would 5¢ help you in selling to the north, where you don't go anywhere?

A. It wouldn't have any bearing on our situation, no.

Q. Why not?

A. Because the reason we are not going to the north is because we haven't worked the north.

Q. Why haven't you worked the north?

A. Because we have had all we could take care of at the other points. I might say this about the distant points, we are in points now we would pull out if we couldn't get more money under this OPA.

1467 Q. Explain that?

A. We wouldn't be able to sell at some of the points we are selling now when the bars are down and competition is normal.

Q. You wouldn't be able to?

A. No, we wouldn't be able to sell in Alexandria, Louisiana. They wouldn't buy f. o. b. St. Louis and pay that freight clear down there.

Q. Well, do I understand, then, that these material costs are not the sole factor affecting how far you can go with your product?

A. Sure; that is what I am getting at. It would cost them more money and I wouldn't be competitive in Alexandria, Louisiana.

Q. In other words, you mean, if the costs of production were lowered, regardless of whether they were material costs or whether they were processing and labor costs, or whether they were selling costs, you wouldn't be able to go farther if the costs were lower?

A. That is right.

Q. In relation to your competitors?

A. That is right.

Q. That is normal in all business?

A. That is right.

Q. And there is no difference whether the saving is in pigment or labor costs?

1468 A. It doesn't matter where it is.

Q. Or if there would be a lowering in the freight rate structure to the south?

A. That would help also.

Q. These constant factors are general?

A. One of other costs; there are items that enter into the cost.

Q. I just want, I think, one or two more questions. Now, do you charge the same price f.o.b. St. Louis for the St. Louis metropolitan area that you charge for, let's say Alexandria, Louisiana?

A. No.

Q. You don't? What is the difference in your price?

A. Do I have to answer that?

Q. I ask that you answer.

Mr. Wright: Your Honor, may we have it read again?

The Witness: It isn't that it isn't clear to me.

(Question read by reporter.)

Mr. Wright: Your Honor, I believe he should be privileged if because of a competitive situation he doesn't want to disclose some concession or discount he gives to get business, say in Alexandria, Louisiana. He stated that there was a difference.

Mr. McDermott: Well, we don't know what his prices are. Maybe if he told us the amount of the difference

1469 Trial Examiner Norwood: How does that bear on the issues?

Mr. Wood: It is the implication in the record that this man sells f.o.b. St. Louis at a uniform price. I want to show that he does not sell at anything approximating a uniform price f.o.b. St. Louis.

Mr. Wright: I believe the witness's testimony was he sold f.o.b. St. Louis with the addition of freight to whatever market he was selling, and he stated the price from St. Louis to Alexandria, Louisiana, is not the same. It is obvious he is embarrassed by having to disclose a differential to a customer in Alexandria, Louisiana.

Mr. Wood: I am not particular about Alexandria, Louisiana. I am perfectly willing to generalize.

Trial Examiner Norwood: Let him do that.

By Mr. Wood:

Q. Can you generalize and tell us just what your pricing system is in selling the 40% in the metropolitan area in St. Louis and the 60% outside of the metropolitan area in St. Louis? Will you please generalize in respect to your pricing practices in regard to each.

A. Our pricing is based practically uniform as f.o.b. St. Louis price. In 90% of our business the same price f.o.b. St. Louis for St. Louis customer or a customer at a distant point.

1470 Q. At a distant point?

A. Yes.

Q. You sell at the same price f.o.b. to a customer in St. Louis as you do say in East Tennessee?

A. Yes.

Q. And the customer pays the freight.

A. That is right.

Q. Can you explain how you compete with a concern such as Mound City which absorbs the freight?

A. Well, we have got quite a proposition there. In the first place, most of our business is through distributors. The business in Tennessee goes through a distributor of ours in Memphis, whom we make all drop shipments to at the present time. Our price of the material is not a matter of our concern as to what the customer is paying, it is what we are charging the distributor in Memphis. He is paying f.o.b. St. Louis price. He is a distributor.

Q. Does he purchase outright from you?

A. Yes, that is right. At the present time it is all handled in drop shipments.

Q. What is drop shipments?

A. I mean, we ship it all for him; he doesn't stock it.

Q. Who pays the freight?

A. The customer pays the freight.

Q. Does he make any freight allowance to the cus-
1471 tomer, or do you know whether he does or not?

A. I don't know whether he does or not.

Q. You don't know whether he does or not?

A. No. It depends on—

Q. So far as you know, he may absorb whatever freight there is from Memphis to destination?

A. He may, yes.

Q. How many other situations of that type do you have?

A. That is the only one we have of that type. I don't care to go into the operations of our business too closely as to how we price and what one customer pays and what another pays.

Q. I don't care for the names of the customers there.

A. If I mention points, they in themselves reveal the customer.

Mr. Wright: Your Honor, the witness has already stated this business is a highly competitive business.

Trial Examiner Norwood: You may explain your process in general terms.

The Witness: I am trying to get this point straight,

too, and that is, I have been criticized for this, but the conditions today are such that you can't use them as a general condition, and what they are going to be tomorrow I don't know. I don't know what our competitors are going to do, but we are going to have to be competitive in those points, and whatever it takes, we are going to have to be competitive to sell paint in those points. How
1472 we will set up our pricing schedule I couldn't say.

By Mr. Wood:

Q. Well, will you please outline for us broadly and without revealing anything confidential just how your actual pricing system varies from the pricing now which you make known to the public?

A. Let me say this, to start out we only had a distributor's price. We have some line lumber yards that are purchasing from us that are buying at a distributor's price. We have large paint store accounts in St. Louis that are buying at distributors' prices. Those prices are uniform. As a result, any business that we have taken on since the freezing of prices has been accounts that would qualify for that price, because we haven't got a higher price that we could charge a small account that wouldn't be rated at that price.

1473 By Mr. Wood:

Q. I don't think I am making myself clear, Mr. Waters. As I understand your position, you have expressed reluctance to reveal your company's pricing practices in general?

A. That is right.

Mr. Wright: Well, Your Honor—

Mr. Wood: Just a minute, please, Mr. Wright. May I finish my question?

Mr. Wright: I would like right at this time to state that this gentleman has stated that the policy of his company was to sell on an f.o.b. St. Louis price, but that they met competition in any market that they were in at what ever price they had to meet it. Now, it is a highly competitive business. I do not think he should be forced to disclose anything which he might consider to be a discrimination from one customer to another.

Trial Examiner Norwood: I am not going to force him to disclose a trade secret. He can use some other point where he does not sell to illustrate that method, but he may cross-examine him on the method. Go ahead.

By Mr. Wood:

Q. Now, what is the nature of the sales policy data which you consider confidential?

A. That is where it is necessary to give an extra discount to a distant point to be competitive in that area.

1474. Q. But you do give extra discounts at distant points to be competitive, is that correct?

A. That is right.

Q. And it is the detail of that pricing structure that you do not wish to make public, is that correct?

A. Yes.

Mr. Wood: That is all.

Mr. Wright: Your Honor, I have just one or two questions I want to ask.

Trial Examiner Norwood: Go ahead.

Redirect Examination by Mr. Wright.

Q. Mr. Waters, what is the date that appears on that formula?

A. 1938.

Q. January 1?

A. January 1, 1938.

Q. Now, the first set of cost figures there, can you state at what period of time those cost figures were applicable, those starting with 7½ cents a pound for basic carbonate?

A. They were applicable 1938.

Q. For how long, do you know?

A. I could not tell you exactly. There has been a change, January, 1944, so I would presume that the prices were the same up to 1944.

Trial Examiner Norwood: Now, are you ques-

1475 tioning him with respect to something that is already in evidence?

Mr. Wright: No sir, I am questioning him on redirect examination with reference to a matter which was brought up on cross- examination.

Mr. McDermott: As a matter of fact, sir, I think Mr. Waters only knows what is on the card, and if you want to read in whatever is on the card, Mr. Wright?

Mr. Wright: I believe the record already shows what I want to bring in except the date on the card. The purpose of the question was, Mr. McDermott stated the cost of this paint to be $1.65.

Trial Examiner Norwood: I just want it to be clear on the record what we are talking about. Go ahead.

By Mr. Wright:

Q. Mr. Waters, you stated the formula of outside white paint was important in competition?

A. Yes.

Q. Is the inclusion of basic carbonate of lead a desirable thing on the formula to be competitive?

A. A very important factor.

Q. Is the outside white lead paint which shows a substantial quantity of basic carbonate of lead considered desirable in the trade?

A. Yes.

Q. Now, in the event that you were in a competi-
1476 tive situation in which you were receiving no profit on your sales of outside white lead paint, and you could receive a 2-cent per gallon saving over your competitors on the material costs of that paint, and you felt that by continuing the prices then in effect you could still maintain your volume of sales of that paint, would you then reduce your price by two cents?

A. No.

Q. In the event you felt it necessary to secure business at any market by reducing your price at that market by two cents to secure the volume in that market, would you then reduce your price by two cents in that market?

A. Yes.

Q. Would you necessarily reduce your price over the entire trade area in which you sell?

A. No.

Q. You referred to a zone system in mixed paints?

A. Yes.

Q. Are you familiar with the use of those systems in this area?

Mr. Duncan: Your Honor, I object. The paint companies are not involved in this proceeding, and the question how they sell the paints, as I understand it, is not attacked in this amended complaint. For that reason I object to the question.

Trial Examiner Norwood: Overruled.

1477 Mr. Wright: On cross-examination Mr. McDermott went into this matter of zones on paint.

By Mr. Wright:

Q. Are you generally familiar with the operation of those zones?

A. To some extent. When I was with Benjamin Moore they practiced that system of pricing.

Q. Are those zones which are used in this area from St. Louis based on the amount of freight to the customer: does that determine the zone in which he is located?

A. Yes.

Q. Do these zones reflect the freight difference between them?

A. Yes.

Q. Now, you stated that the paint business in the area in which you are located is highly competitive?

A. Yes.

Q. Is the business of supplying lead pigments to paint manufacturers in this area highly competitive?

Mr. DuBose: We object to that on the ground this gentleman is no expert.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: You are going outside the range of the previous examination.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: Sustained.

1478 Mr. Wright: No further questions.

Mr. McDermott: I have a few questions.

Trial Examiner Norwood: Go ahead.

Recross Examination by Mr. McDermott.

Q. In connection with your answer to Mr. Wright's question on redirect examination, you said at the distant points you might reduce the price when you had a 2-cent saving in material costs in order to be competitive, is that correct?

A. That is right.

Q. Now, in order to be competitive at the distant points you also make additional discounts; you have testified to that?

A. Yes.

Q. Right?

A. That is right.

Q. So that at these distant points wherever you want

to be competitive and you do not have an instant saving you make an additional discount?

A. If we feel that we want the business.

Q. When you want the business?

A. Yes.

Mr. McDermott: That is all.

Trial Examiner Norwood: Thank you. You are excused.

(Witness excused.)

Mr. Wright: Your Honor, I would like to suggest.
1479 that we now recess until the 16th of September in Washington; and I want to state now that I consider that the Commission's case is substantially complete, we may have some more witnesses, but that the respondents' counsel should in the interim be considering the matter of their own defense so that we won't unduly delay it after that time.

Trial Examiner Norwood: Does that date and place suit counsel? Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Well, that date will be satisfactory, gentlemen. And I hope that inasmuch as the Commission's counsel stated that he has very little more evidence to put in that counsel for respondents will do the best they can to prepare to go ahead with their case at a reasonable time after the resting of the Commission's case; and that also, if they will refer to the Rules of Practice respecting the corrections to the record; that they may be made to cover what record we have made at the resting of the Commission's case. Unless counsel insist on that, it can go over the close of the evidence, but I should think that if there are any real vital corrections to be made, I think respondents have a right to know what they are going to meet; so you will see the Rules of Practice there respecting the method of making those; and you
make triplicate lists and furnish the Trial Examiner
1480 with lists of suggested corrections and furnish the other side with lists. Most of this is done by agreement.

Mr. Wright: I believe counsel for the Commission will be prepared to make a list of corrections to the record at the time of closing the Commission's case.

Mr. McDermott: We will try to do that, too.

Mr. Welch: Is that done at the close of the Commission's case or close of the case?

Mr. Wright: I believe it is at the close of the Commission's case so if there is any serious error which may affect your defense it may be corrected.

Mr. Welch: I see.

Trial Examiner Norwood: It may be done at either place. It may be done when the Commission rests, otherwise it usually does go to the end. The rule was made in order to prevent corrections to the record being scattered through the entire record, because that took a great deal of time to search for corrections; and then I started the practice and sold some of the other trial examiners on it of making corrections at the opening of each hearing, then you didn't have to look through the whole booklet. Now, I think this other is better.

The hearing is now adjourned to reconvene in Washington, D. C., in Room 332, Office of the Federal Trade Commission, at 10 o'clock a. m., Standard Time, on September 16, 1946.

(Whereupon, at 12:15 p. m., July 30, 1946, the hearing in the above-entitled matter was adjourned to reconvene on September 16, 1946, in Washington, D. C.

1481 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
September 16, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, Attorney for the Federal Trade Commission.

1482 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in this case in St. Louis, Missouri, on the 30th day of July, 1946, the hearing in Docket No. 5253 is now reconvened in Room 332, Federal Trade Commission Building, Washington, D. C., at 10 o'clock a. m., on the 16th day of September, 1946.

Mr. Wright appears in support of the complaint and there are no appearances for any of the respondents.

Mr. Wright: Your Honor, I advised counsel by letter last week that the only matter to be presented this morning would be a request for an adjournment until October 1, 1946 here in Washington—and counsel thereupon waived their appearance here today. I would now like to suggest that an adjournment be granted until 10 a m., October 1, 1946, in Room 332 in the Federal Trade Commission Building in Washington.

Trial Examiner Norwood: You say that counsel have been advised of date to which you request adjournment?

Mr. Wright: Yes, and I figured that the record this morning would serve as official notice of the setting of that date.

Trial Examiner Norwood: The motion is granted and the hearing is adjourned until 10 o'clock a. m. on October 1, 1946, in Room 332, offices of the Federal Trade
1483 Commission, Washington, D. C.

(Whereupon, at 10:03 a. m., September 16, 1946, the hearing in the above entitled matter was adjourned to October 1, 1946, at 10:00 a. m.)

1484 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
Wednesday, October 2, 1946.

Met, pursuant to adjournment and subsequent notice, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

James T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N. W., Washington, D. C.), attorney for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Paorke & Whiteside, 25 Broadway, New York, N. Y.), attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq. and Edmund P. Wood, Esq., attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

James D. Ewing, Esq. and E. Z. Du Bose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for National Lead Company.

Roger Hinds, Esq (165 Broadway, New York, N. Y.), attorney for The Glidden Company.

1485 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment at Washington, D. C., on September 16, 1946, and the postponement on yesterday by agreement of counsel, the hearing in Docket 5233 is now reconvened in room 332, office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., on the 2nd day of October, 1946.

Enter the appearances.

(Appearances, as indicated on title page, were entered.)

Trial Examiner Norwood: Go ahead, Mr. Wright.

Mr. Wright: Your Honor, the witness who was called for 10 o'clock might be delayed on account of an appointment.

There are a number of subpoenaes duces tecum which were returnable today. I wonder if counsel for Glidden is prepared to make a return?

Mr. Hinds: Yes, sir, we have responses to the subpoenaes in our possession, consisting of copies of invoices, price cards and shipping lists. Those not produced within the description of the subpoenaes are not produced for reason of the fact that they are not in existence, having been destroyed in the ordinary course of business
1486 procedure.

Mr. Wright: I would like to ask that these documents be marked for identification as Commission's Exhibits 829, 830, 83-A through 831-Z-61, and 832.

(The documents referred to were marked Commission's Exhibits 829; 830; 831-A, 831-B, 831-C, 831-D, 831-E, 831-F, 831-G, 831-H, 831-I, 831-J, 831-K, 831-L, 831-M, 831-N, 831-O, 831-P, 831-Q, 831-R, 831-S, 831-T, 831-U, 831-V, 831-W, 831-X, 831-Y, 831-Z, 831-Z-1, 831-Z-2, 831-Z-3, 831-Z-4, 831-Z-5, 831-Z-6, 831-Z-7, 831-Z-8, 831-Z-9, 831-Z-10, 831-Z-11, 831-Z-12, 831-Z-13, 731-Z-14, 831-Z-15, 831-Z-16, 831-Z-17, 831-Z-18, 83-Z-19, 831-Z-20, 831-Z-21, 831-Z-22, 831-Z-23, 831-Z-24, 831-Z-25, 831-Z-26, 831-Z-27, 831-Z-28, 831-Z-29, 831-Z-30, 831-Z-31, 831-Z-32, 831-Z-33, 831-Z-34, 831-Z-35, 831-Z-36, 831-Z-37, 831-Z-38, 831-Z-39, 831-Z-40, 831-Z-41, 831-Z-42, 831-Z-43, 831-Z-44, 831-Z-45, 831-Z-46, 831-Z-47, 831-Z-48, 831-Z-49, 831-Z-50, 831-Z-51, 831-Z-52, 831-Z-53, 831-Z-54, 831-Z-55, 831-Z-56, 831-Z-57, 831-Z-58, 831-Z-59, 831-Z-60, 831-Z-61, and 832, for identification.)

Mr. Wright: Mr. Hinds, is the document marked as Commission's Exhibit 832 the certificate of The
1487 Glidden Company?

Mr. Hinds: Yes, sir, that is signed by the secretary, Mr. Kolb.

Mr. Wright: I now offer in evidence Commission's Exhibits 829 and 830, consisting of price cards which were returned under a subpoena.

Mr. Hinds: No objection.

Trial Examiner Norwood: Commission's Exhibits 829 and 830 are received in evidence.

(The documents referred to, heretofore marked for iden-

tification COMMISSION'S EXHIBITS 829 and 830, were received in evidence.)

Mr. Wright: I now offer in evidence Commission's Exhibits 831-A through 831-Z-49, consisting of invoices and shipping memoranda produced under subpoena for the four months' period of September, October, November and December, 1941.

Mr. Hinds: No objection.

Trial Examiner Norwood: Commission's Exhibits 831-A through 831-Z-49 are received in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 831-A, 831-B, 831-C, 831-D, 831-E, 831-F, 831-G, 831-H, 831-I, 831-J, 831-K, 831-L, 831-M, 831-N, 831-O, 831-P, 831-Q, 831-R, 831-S, 831-T, 831-U, 831-V, 831-W, 831-X, 831-Y, 831-Z, 831-Z-1, 831-Z-2, 831-Z-3, 831-Z-4, 831-Z-5, 831-Z-6,
1488 831-Z-7, 831-Z-8, 831-Z-9, 831-Z-10, 831-Z-11, 831-Z-12, 831-Z-13, 831-Z-14, 831-Z-15, 831-Z-16, 831-Z-17, 831-Z-18, 831-Z-19, 831-Z-20, 831-Z-21, 831-Z-22, 831-Z-23, 831-Z-24, 831-Z-25, 831-Z-26, 831-Z-27, 831-Z-28, 831-Z-29, 831-Z-30, 831-Z-31, 831-Z-32, 831-Z-33, 831-Z-34, 831-Z-35, 831-Z-36, 831-Z-37, 831-Z-38, 831-Z-39, 831-Z-40, 831-Z-41, 831-Z-42, 831-Z-43, 831-Z-44, 831-Z-45, 831-Z-46, 831-Z-47, 831-Z-48 and 831-Z49, were received in evidence.)

Mr. Wright: I now offer in evidence Commission's Exhibit 832.

Mr. Hinds: No objection.

Trial Examiner Norwood: Commission's Exhibit 832 is received in evidence.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 832, was received in evidence.)

Mr. Wright: Your Honor, I would like to call Mr. Depue to the stand.

CARL H. DEPUE was thereupon called as a witness for the Commission and, having been previously duly sworn, testified as follows:

1489 *Direct Examination by Mr. Wright.*

Q. Your name is Carl H. Depue?

A. Yes, sir.

Mr. Wright: I believe Mr. Depue has already been qualified on the record.

Trial Examiner Norwood: Yes.

Mr. Wright: I ask to have these marked Commission's Exhibits 825-A through 825-Z-10.

(The documents referred to were marked COMMISSION'S EXHIBITS 825-A, 825-B, 825-C, 825-D, 825-E, 825-F, 825-G, 825-H, 825-I, 825-J, 825-K, 825-L, 825-M, 825-N, 825-O, 825-P, 825-Q, 825-R, 825-S, 825-T, 825-U, 825-V, 825-W, 825-X, 825-Y, 825-Z, 825-Z-1, 825-Z-2, 825-Z-3, 825-Z-4, 825-Z-5, 825-Z-6, 825-Z-7, 825-Z-8, 825-Z-9, 825-Z-10 for identification.)

By Mr. Wright:

Q. Mr. Depue, I hand you herewith documents marked for identification as Commission's Exhibits 825-A through 825-Z-10 and ask you to identify them.

A. Why, they all contain supplemental information obtained from the invoices of Eagle-Picher Sales Company.

Q. Were those documents prepared by you?

A. Yes, or under my direction.

Q. I call your attention to the initials CHD appearing on the corner of a number of sheets. Will you state 1490 what they are?

A. Those are my initials.

Q. Mr. Depue, was the information that appears in there secured from the records of the Eagle-Picher Company?

A. Yes.

Q. Just what things did you take off the record of the Eagle-Picher Company in preparing those sheets?

A. Well, they first show the invoices by number and date to which reference is made, and then they go further and show the order number and date, the date shipped, if that is revealed by the invoices, and also any references to contracts which may have appeared on those invoices.

Q. I direct your attention to the extreme left-hand column on Commission's Exhibit 825-A, the figures 754-D, G, J, Q, and S. What do those indicate?

A. Those are the exhibits previously put into the record to which of these sheets pertains. That first sheet happens to refer to several exhibits, but most of these sheets are limited to some one exhibit.

Q. Does the information appearing opposite these exhibit numbers relate to the same transactions which appear on those exhibits, in Exhibit 754-D, for instance?

A. I did not quite follow the question.

Q. I call your attention to the column marked "Invoice No." and to the figure "NY-785", which is opposite
1491 the notation "754-D". Does that relate to the same transaction as appears on Exhibit 754-D of the Commission?

A. Well, that particular invoice, NY-785, does appear on the previous exhibit 754-D; and likewise with respect to each of these other invoices which appear on the exhibits shown in the first column. The reason there are so few invoices listed here is that most of the invoices on these exhibits are covered by the explanatory note below, which covers consignment sales.

Q. I direct your attention to the explanatory note appearing on the bottom of Commission's Exhibit 825-A and ask if you will read that, please.

A. (Reading.) "All other invoices listed in Com. Exh. 754-B to U, inclusive, covered sales of white lead in oil described of these invoices as 'Consignment Sales', 'Cons. Stock' or 'Dist. Stock', and all of these invoices read 'as per contract' but none of them show the dates of the contracts referred to; and none of these invoices show number or date of customer's orders. Some of these invoices show a date in the space provided for date of shipment but the date thus shown is generally the 25th of the month, the same date as the invoice or a date near
1492 the end of the month for which the bill was rendered. Each of the bills refers to a particular month and appears to cover a monthly settlement.

"Explanatory footnote on Com. Exh. 754-B states that 'Distributors were billed for shipments from consigned stocks during the month, under unlimited consignment contract in effect during 1941, 1942 and 1943 on white lead in-oil.'"

Q. Mr. Depue, did you enter on these sheets all the information appearing on the invoices of the Eagle-Picher Company which would show the dates on which the goods were ordered by the customer or any contractual arrangements that might have been existing between that customer and Eagle-Picher?

A. Yes, everything that appeared on the invoices, that was pertinent to that question.

Q. I direct your attention now to Commission's Exhibit 825-M, and in lines 13 through 18 I note that there is no information regarding the date of the customer's order.

A. Well, then, none appeared on the invoice.

Mr. Wright: I have no further questions on the identification of the documents.

Mr. Wood: Are you introducing them?

Mr. Wright: I plan to, yes.

Mr. Wood: When?

1493 Mr. Wright: I believe you can cross on the identification now.

Trial Examiner Norwood: What is the proffer here? Commission's Exhibits for identification 825-A through 825-Z-10?

Mr. Wright: Yes.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: May we go off the record a moment?

1494 Trial Examiner Norwood: Yes.

(Discussion off the record.)

Mr. Wright: Your Honor, I offer Commission's Exhibits 825-A through 825-Z-10 in evidence.

Mr. Wood: I object to the offer, because there is no connection of the exhibits with the case. There is no explanation of the data on the exhibits. The longhand notes of the witness, particularly characterizing consignment sales, this, that, and the other thing, are entirely his own interpretation.

Trial Examiner Norwood: Yes.

Mr. Wood: The evidence is not ponderable evidence. At the present time, the evidence is not ponderable for anything connected with the case.

Further, I want to renew the objection I made last June in respect to all these invoices; that the Federal Trade Commission should tell us here and now each pair of prices which are different, each pair that they are going to contend constitutes an illegal discrimination; otherwise, we are going to be taking testimony from here to the end of time, if we try to justify every possible pair of prices.

Mr. Hinds: Your Honor, I have already written to the Commission requesting that that be done. Obviously, it would be a very punitive imposition on the respondents to

1495 make them speculate in advance as to which of the thousands of transactions are contended by the Government to represent discriminatory pairs. We know whether or not they are discriminatory, but we do not know what this Commission will contend in that respect. We should not be required to speculate as to what their contentions are, because obviously it is admitted that many, if not most of them, are innocent.

We want to know which they claim are discriminatory.

Mr. Wood: Furthermore, Mr. Examiner, Mr. Woodman, in public statements and public addresses, has said that the Commission was a little bit loath to take full advantage of the decision of the Circuit Court of Appeals in the Moss case. But if you will apply that particular law to the situation in hand, where you have among the various respondents thousands and thousands of prices, and if the burden shifts and we have to try and justify every one of those things without knowing the Commission's contentions, you can see the impossible situation we are up against.

So I object to these exhibits, unless the Commission is specific in relation to its case, and unless more is shown about the exhibits to make them ponderable and substantial evidence in the case.

Mr. Wright: Your Honor, to begin with, this exhibit adds nothing to Commission's Exhibit 754.

Mr. Wood: Then I move—

Trial Examiner Norwood: Wait a minute.

1496 Mr. Wright: Commission's Exhibit 754 is a tabulation of the transactions of the Eagle-Picher Company at certain localities and over certain periods of time, and is expected to bring out all information regarding the date of the customer's order and everything that appeared on the invoice regarding the date, or any contractual relations that the Eagle-Picher Company and customers in the invoices were engaged in.

Now, as to the point that Mr. Hinds and Mr. Wood have raised about the Commission giving a statement of the transactions one by one, that they contend constitute price discrimination under Section 2 of the Clayton Act, I submit that there is no place in the present argument about the admissibility of this exhibit for that. I will say for the benefit of counsel that I intend, at the time the Commission rests its case, to make as complete a statement as I can make of what I consider the issues to be in the matter, and what I consider the Commission has proved in those issues.

I do not think it is any part of this case to be making any such general statements before we have the case in.

Mr. Wood: On the contrary, your Honor, I think the statement should be made now, because here we have the witness on the stand—

Trial Examiner Norwood: Now, wait a minute: It is

very clear just what a proponent has to state in fair-
1497 ness to the other side, and so forth. He has to state his case, and state the contention of particulars there, and then he produces evidence, and then the other side has an opportunity to meet all that evidence. But he does not have to put all these little bits of evidence in the pleading, and he does not have to advance it at any particular time in the case. I do not think there is much point to that.

Now, as to this other thing, as to the papers containing conclusions of this witness as to what those papers contain, I will say that of course the invoices show what they contain. If there are any conclusions there that really are not very plain and that do amount to strained interpretations, I shall not consider them.

Mr. Wright: Your Honor, may I say right there, it is not my intention to probe the nature of any consignment relations or contractual relations through this exhibit or through any notes that appear on it. I can assure counsel that the proffer is not for that purpose.

Trial Examiner Norwood: As I understand it, this was to meet an objection that was made as to the nature of the sales, as to whether or not the sales price there was made at the time of the order, was named at the time of the shipment, and whether or not that was the price. To meet that objection, and to clarify that question, this expert has been asked to accumulate the data which appear on
1498 these invoices. In doing so, he had to classify them to a certain extent, and I do not see any objection to it.

Mr. Wood: If your Honor please, the objection was not my objection at the last hearing, that was Mr. Hinds' objection. I had an objection, but it was not on that particular ground, if you remember.

Trial Examiner Norwood. That is right.

Mr. Wood: Here is this set of documents, all in very clear, legible longhand. They are a compilation of the witness, and they are argumentative exhibits. I mean, they are not a duplicate of anything in the world, they are the witness' compilation of something, and I want to know their purpose in the case before they are admitted in evidence, whatever it is.

Mr. Wright: Your Honor, it was the testimony of the witness that the figures and facts appearing in there were taken directly from the records of the Eagle-Picher Company.

Mr. Wood: The Eagle-Picher Company has stacks of records that high (indicating) and storerooms full of records. I want to know what this supposed evidence has to do with the case, if anything. I think the witness should testify, or you should make the statement, as to what the connection is.

Trial Examiner Norwood: I will overrule the objection and receive these exhibits, because I think they will be
1499 helpful to both sides here, in that I think it is a classification of the data there, and if there appears to be anything objectionable in them, or any wrong conclusions in the papers, why, after a study and after we know what we are doing, we will strike them, if they are to be stricken.

Mr. Wood: I want to know what we are doing right now.

Trial Examiner Norwood: We are receiving those in evidence. Objection overruled.

Mr. Wood: My objection, for the record, is they are argumentative exhibits, compiled by an expert witness for purposes we do not know. We are not disputing the absolute facts taken from the invoices, but it is an argumentative interpretation, the purposes of which we do not know, and I object to them as not being ponderable evidence or anything having to do with this case.

Mr. Wright: Your Honor, I am willing to qualify the offer on that. I offer them only to show the dates of shipments and the dates of orders in the transactions covered in that tabulation, as related to Commission's Exhibit 754 and subnumbers.

Trial Examiner Norwood: I do not see anything argumentative on here.

Mr. Wood: If your Honor please, that has just been put on the table this morning. I have not read it. If
1500 I spent several hours or days studying that, I might have no objection whatsoever, but there is all that longhand there of the witness, and I do not know what it says.

Trial Examiner Norwood: As a matter of fact, I do not see that longhand but on one sheet.

Mr. Wood: I mean all those pages of handwritten tabulations that I have never seen before. I have no question on the honesty of this witness.

Trial Examiner Norwood: The counsel has an objection

and an automatic exception, and we shall receive these. Go ahead.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 825-A, 825-B, 825-C, 825-D, 825-E, 825-F, 825-G, 825-H, 825-I, 825-J, 825-K, 825-L, 825-M, 825-N, 825-O, 825-P, 825-Q, 825-R, 825-S, 825-T, 825-U, 825-V, 825-W, 825-X, 825-Y, 825-Z, 825-Z-1, 825-Z-2, 825-Z-3, 825-Z-4, 825-Z-5, 825-Z-6, 825-Z-7, 825-Z-8, 825-Z-9, and 825-Z-10, were received in evidence.)

Mr. Wright: I would like to ask a few more questions of this witness.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Mr. Depue, from what records of the Eagle-Picher Company did you secure the information appearing in these exhibits?

1501 A. From the invoices, as stated right there on each of these sheets.

Trial Examiner Norwood: It shows that on every item, does it?

The Witness: Yes.

By Mr. Wright:

Q. Were these invoices secured from The Eagle-Picher Company as invoices covering the transactions?

A. They were.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Mr. Hinds: No cross.

Mr. Wood: I would like a short recess to look at those exhibits, to see if I have any objections.

Mr. Wright: Your Honor, in that connection, I have no objection to recessing for that purpose, but I furnished counsel for Eagle-Picher a copy of this yesterday morning.

Mr. Wood: No cross-examination, your Honor. My objection stands in the record.

Trial Examiner Norwood: Yes. Well, as long as we are going right ahead with this witness with some other documents, we will have a recess at the regular time here, at 11 o'clock. We will return to this exhibit here in the general cross-examination of the witness. I think that

1502 will be satisfactory to everybody. Proceed.

Mr. Wright: I ask to have these marked for identification as Commission's Exhibits 826-A through 826-Y.

(The documents referred to were marked Commission's Exhibits 826-A, 826-B, 826-C, 826-D, 826-E, 826-F, 826-G, 826-H, 826-I, 826-J, 826-K, 826-L, 826-M, 826-N, 826-O, 826-P, 826-Q, 826-R, 826-S, 826-T, 826-U, 826-V, 826-W, 826-X, and 826-Y, for identification.)

By Mr. Wright:

Q. Mr. Depue, I show you documents marked for identification as Commission's Exhibits 826-A through 826-Y, and ask you to state what they are.

A. Each of these sheets sets forth supplemental information obtained from the invoices referred to, and likewise referred to on each of the original exhibits previously entered in the record, which is shown at the top of each of these sheets, and the supplemental information—

Mr. Hinds: (Interposing.) Pardon me, what company is he referring to?

Mr. Wright: Sherwin-Williams.

The Witness: Sherwin-Williams. This supplemental information shows the order number and the date, or the date that the orders were entered by the company, or the date on which the goods were shipped, and also shows any references on these invoices to contracts, by number or date.

1503 Each of these sheets covers a particular exhibit, referred to at the top.

By Mr. Wright:

Q. In other words, this Commission's exhibit for identification, 826-B, refers to the transactions on Commission's Exhibit 794-C?

A. That is right.

Q. And that applies to all the other sheets in the exhibit?

A. Yes. Each of them mentions the previous exhibit, for convenience of reference.

Q. Did you enter on these sheets, Mr. Depue, all of the information which appeared on the invoices of Sherwin-Williams, listed there, regarding the dates of orders and shipments and regarding any contracts that it might have obtained?

A. Yes, that is true.

Mr. Wright: Your Honor, I offer Commission's Exhibits 826-A through 826-Y in evidence.

Trial Examiner Norwood: Any objection?

Mr. Welch: Your Honor, we assume that the offer of these exhibits is limited to the same purpose as the exhibits with which they are connected, to wit, Commission's Exhibit 794, and so on?

Mr. Wright: That is true.

Mr. Welch: That being true, we have only the same objection that we have always had to the basic exhibit, 1504 to which this is a supplement.

Trial Examiner Norwood: Yes.

Mr. Welch: We have no different objection, other than that.

Mr. Wright: I would like to say right now, I do not mean to modify or limit in any way the basic exhibit to which these refer, in this instance, Commission's Exhibit 794, by my limitation of the offer of these exhibits.

Mr. Welch: It was my understanding that Exhibit 794 was offered for the purpose of proving certain specific things, and that this is offered in continuation and supplemental of that, and for no other purpose.

Mr. Wright: That is true.

Mr. Welch: Off the record, if you please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, I will temporarily withdraw my offer of these exhibits in evidence.

Trial Examiner Norwood: Yes.

Mr. Wright: I want to have these marked Commission's Exhibits 827-A through 827-Z.

(The documents referred to were marked Commission's Exhibits 827-A, 827-B, 827-C, 827-D, 827-E, 827-F, 827-G, 827-H, 827-I, 827-J, 827-K, 827-L, 827-M, 827-N, 827-O, 1505 827-P, 827-Q, 827-R, 827-S, 827-T, 827-U, 827-V, 827-W, 827-X, 827-Y, and 827-Z, for identification.)

By Mr. Wright:

Q. Mr. Depue, I show you documents marked for identification as Commission's Exhibits 827-A through 827-Z, and ask you to state what they are.

Mr. Hinds: Will you please state what respondents it refers to?

Mr. Wright: Anaconda.

The Witness: These sheets contain supplemental information obtained from the invoices of the International Smelting & Refining Company, listed on the previous ex-

hibits, which are referred to on the top of each of these sheets, and the supplemental information includes the order number and date, if they appeared on the invoices; likewise, the date shipped, if they appeared, and any references to contracts by number or date, which appeared on the invoices listed on each of these sheets.

It all pertains to the order of shipments.

By Mr. Wright:

Q. Was all this information obtained from the records of the International Smelting & Refining Company?

A. Yes, from their invoices referred to on each of these sheets.

Q. I call your attention to the initials on sheets 1506 827-U, 827-V, and 827-W, "F. McM."

A. Those are Mr. McManus' initials. Where it says "CHD" they are mine. That indicates which one of us elicited this information from the invoices.

Q. Was all of the tabulated material listed in there either compiled directly by you or under your direction?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibits 827-A through 827-Z in evidence.

Trial Examiner Norwood: Any objection?

Mr. Gardiner: Your Honor, there is no objection to the admission of these, with the exception I should like the record to show that the objection made to the offer of the original exhibits to which these refer applies to these as well.

Trial Examiner Norwood: Yes. Any further objection? If not, objection overruled. The exhibits are received for the purposes stated.

(The documents referred to, heretofore marked for identification Commission's Exhibits 827-A, 827-B, 827-C, 827-D, 827-E, 827-F, 827-G, 827-H, 827-I, 827-J, 827-K, 827-L, 827-M, 827-N, 827-O, 827-P, 827-Q, 827-R, 827-S, 827-T, 827-U, 827-V, 827-W, 827-X, 827-Y, and 827-Z, were received in evidence.

1507 Mr. Wright: I want to have these marked Commission's Exhibits 828-A through 828-Z-143, for identification.

(The documents referred to were marked Commission's Exhibits 828-A, 828-B, 828-C, 828-D, 828-E, 828-F, 828-G, 828-H, 828-I, 828-J, 828-K, 828-L, 828-M, 828-N, 828-O, 828-P, 828-Q, 828-R, 828-S, 828-T, 828-U, 828-V, 828-W,

828-X, 828-Y, 828-Z, 828-Z-1, 828-Z-2, 828-Z-3, 828-Z-4, 828-Z-5, 828-Z-6, 828-Z-7, 828-Z-8, 828-Z-9, 828-Z-10, 828-Z-11, 828-Z-12, 828-Z-13, 828-Z-14, 828-Z-15, 828-Z-16, 828-Z-17, 828-Z-18, 828-Z-19, 828-Z-20, 828-Z-21, 828-Z-22, 828-Z-23, 828-Z-24, 828-Z-25, 828-Z-26, 828-Z-27, 828-Z-28, 828-Z-29, 828-Z-30, 828-Z-31, 828-Z-32, 828-Z-33, 828-Z-34, 828-Z-35, 828-Z-36, 828-Z-37, 828-Z-38, 828-Z-39, 828-Z-40, 828-Z-41, 828-Z-42, 828-Z-43, 828-Z-44, 828-Z-45, 828-Z-46, 828-Z-47, 828-Z-48, 828-Z-49, 828-Z-50, 828-Z-51, 828-Z-52, 828-Z-53, 828-Z-54, 828-Z-55, 828-Z-56, 828-Z-57, 828-Z-58, 828-Z-59, 828-Z-60, 828-Z-61, 828-Z-62, 828-Z-63, 828-Z-64, 828-Z-65, 828-Z-66, 828-Z-67, 828-Z-68, 828-Z-69, 828-Z-70, 828-Z-71, 828-Z-72, 828-Z-73, 828-Z-74, 828-Z-75, 828-Z-76, 828-Z-77, 828-Z-78, 828-Z-79, 828-Z-80, 828-Z-81, 828-Z-82, 828-Z-83, 828-Z-84, 828-Z-85, 828-Z-86, 828-Z-87, 828-Z-88, 828-Z-89, 828-Z-90, 828-Z-91, 828-Z-92, 828-Z-93, 828-Z-94, 828-Z-95, 828-Z-96, 828-Z-97, 828-Z-98, 828-Z-99, 828-Z-100, 828-Z-101, 828-Z-102, 828-Z-103, 828-Z-104, 828-Z-105, 828-Z-106, 828-Z-107, 828-Z-108, 828-Z-109, 828-Z-110, 828-Z-111, 828-Z-112, 828-Z-113, 828-Z-114, 828-Z-115, 828-Z-116, 1508 828-Z-117, 828-Z-118, 828-Z-119, 828-Z-120, 828-Z-121, 828-Z-122, 828-Z-123, 828-Z-124, 828-Z-125, 828-Z-126, 828-Z-127, 828-Z-128, 828-Z-129, 828-Z-130, 828-Z-131, 828-Z-132, 828-Z-133, 828-Z-134, 828-Z-135, 828-Z-136, 828-Z-137, 828-Z-138, 828-Z-139, 828-Z-140, 828-Z-141, 828-Z-142, 828-Z-143 for identification.)

By Mr. Wright:

Q. Mr. Depue, I hand you herewith Commission's Exhibits for identification 828-A through 828-Z-143, and ask you to identify them.

Mr. Hinds: Please state what respondent you refer to in each case.

Mr. Wright: National Lead Company.

The Witness: These sheets contain supplemental information obtained from invoices of the National Lead Company, which appeared on the exhibits referred to at the top of each sheet. This supplemental information pertains to the order number, the date, or the date of shipment, or to contracts, as such information appeared on the invoices.

By Mr. Wright:

Q. Was this exhibit prepared entirely by you or under your direction, Mr. Depue?

A. Yes.

Q. I call your attention to the initials, "JSK" on 1509 sheet 828-Z-131.

A. Well, those are the initials of Mr. Keller, but it was all done under my direction.

Q. Were the invoices from which you filed this information furnished you by the National Lead Company?

A. Yes.

Q. And the transactions listed on the pages of this exhibit refer to corresponding transactions listed on the pages of Commission's Exhibit 752, is that correct?

A. Precisely. One sheet for each previous exhibit.

Mr. Wright: Your Honor, I offer Commission's Exhibits 828-A through 828-Z-143 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I would like the record to show an objection to the offer of these exhibits on all of the grounds heretofore entered in connection with the exhibits to which these refer, and I would also like to ask counsel for the Commission if my understanding is correct that this offer is for the limited purposes heretofore indicated in connection with similar exhibits introduced this morning.

Mr. Wright: It is so limited.

Mr. Ewing: And I would further object to the extent that the exhibits, or any portion thereof, appear to contain a characterization of the witness; as, for example, the second sheet, which has apparently a photostat 1510 numbered 90 on it. There is a note at the bottom stating,

"The above invoices purport to cover shipments from consigned stocks during the months in which billed, though the invoices are dated before the end of the month."

My objection is to any conclusion or characterization that appears on these exhibits.

Trial Examiner Norwood: Would not that be the avoidance of an ultimate conclusion there?

Mr. Ewing: Well, it could be interpreted either way. It might be expressing a doubt as to whether it was a shipment from consigned stock, or it might be a careful attempt not to commit themselves one way or the other.

Trial Examiner Norwood: That would be a conclusion, wouldn't you say?

Mr. Wright: Your Honor, in view of the limited purpose for which the offer is made, I do not believe the ob-

jection should be given any weight. The offer is for the purpose of showing as much information as is possible about the order dates, and the shipping dates, and any prior arrangements that might have been referred to on the invoices. I certainly am not going to rely on any notes on there to prove anything regarding the nature and function of consignment contracts.

Trial Examiner Norwood: Objection overruled, 1511 and the exhibits are received for the purposes stated.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 828-A, 828-B 828-C, 828-D, 828-E, 828-F, 828-G, 828-H, 828-I, 828-J, 828-K, 828-L, 828-M, 828-N, 828-O, 828-P, 828-Q, 828-R, 828-S, 828-T, 828-U, 828-V, 828-W, 828-X, 828-Y, 828-Z, 828-Z-1, 828-Z-2, 828-Z-3, 828-Z-4, 828-Z-5, 828-Z-6, 828-Z-7, 828-Z-8, 828-Z-9, 828-Z-10, 828-Z-11, 828-Z-12, 828-Z-13, 828-Z-14, 828-Z-15, 828-Z-16, 828-Z-17, 828-Z-18, 828-Z-19, 828-Z-20, 828-Z-21, 828-Z-22, 828-Z-23, 828-Z-24, 828-Z-25, 828-Z-26, 828-Z-27, 828-Z-28, 828-Z-29, 828-Z-30, 828-Z-31, 828-Z-32, 828-Z-33, 828-Z-34, 828-Z-35, 828-Z-36, 828-Z-37, 828-Z-38, 828-Z-39, 828-Z-40, 828-Z-41, 828-Z-42, 828-Z-43, 838-Z-44, 828-Z-45, 828-Z-46, 828-Z-47, 828-Z-48, 828-Z-49, 828-Z-50, 828-Z-51, 828-Z-52, 828-Z-53, 828-Z-54, 828-Z-55, 828-Z-56, 828-Z-57, 828-Z-58, 828-Z-59, 828-Z-60, 828-Z-61, 828-Z-62, 828-Z-63, 828-Z-64, 828-Z-65, 828-Z-66, 828-Z-67, 828-Z-68, 828-Z-69, 828-Z-70, 828-Z-71, 828-Z-72, 828-Z-73, 828-Z-74, 828-Z-75, 828-Z-76, 828-Z-77, 828-Z-78, 828-Z-79 828-Z-80, 828-Z-81, 828-Z-82- 828-Z-83, 828-Z-84, 828-Z-85, 828-Z-86, 828-Z-87, 828-Z-88, 828-Z-89, 828-Z-90, 828-Z-91,
828-Z-92, 828-Z-93, 828-Z-94, 828-Z-95, 828-Z-96, 828-
1512 Z-97, 828-Z-98, 828-Z-99, 828-Z-100, 828-Z-101, 828-Z-
102, 828-Z-103, 828-Z-104, 828-Z-105, 828-Z-106, 828-Z-107, 828-Z-108, 828-Z-109, 828-Z-110, 828-Z-111, 828-Z-112, 828-Z-113, 828-Z-114, 828-Z-115, 828-Z-116, 828-Z-117, 828-Z-118, 828-Z-119, 828-Z-120, 828-Z-121, 828-Z-122, 828-Z-123, 828-Z-124, 828-Z-125, 828-Z-126, 828-Z-127, 828-Z-128, 828-Z-129, 828-Z-130, 828-Z-131, 828-Z-132, 828-Z-133, 828-Z-134, 828-Z-135, 828-Z-136, 828-Z-137, 828-Z-138, 828-Z-139, 828-Z-140, 828-Z-141, 828-Z-142, 828-Z-143, were received in evidence.)

Mr. Wright: Your Honor, I would like to have these documents marked for identification as Commission's Exhibits 835-A through 835-Z-21.

(The documents referred to were marked as Commis-

sion's Exhibits 835-A, 835-B, 835-C, 835-D, 835-E, 835-F, 835-G, 835-H, 835-I, 835-J, 835-K, 835-L, 835-M, 835-N, 835-O, 835-P, 835-Q, 835-R, 835-S, 835-T, 835-U, 835-V, 835-W, 835-X, 835-Y, 835-Z, 835-Z-1, 835-Z-2, 835-Z-3, 835-Z-4, 835-Z-5, 835-Z-6, 835-Z-7, 835-Z-8, 835-Z-9, 835-Z-10, 835-Z-11, 835-Z-12, 835-Z-13, 835-Z-14, 835-Z-15, 835-Z-16, 835-Z-17, 835-Z-18, 835-Z-19, 835-Z-20, and 835-Z-21, for identification.)

Trial Examiner Norwood: We will take a five-minute recess.

1513 (Whereupon, a short recess was taken.)

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Mr. Depue, I show you documents marked Commission's Exhibits 835-A through 835-Z-21, and ask you to state what they are.

A. Well, these sheets contain supplemental information with respect to the date of the order or the number of the order, or the date it was entered, or the date the goods were shipped, and any references which appeared on the contracts, the number or date of any contract. Each of these sheets refers to the invoices which appeared on certain previous exhibits, which are shown at the top of each of these sheets.

The information was all obtained from the invoices of The Glidden Company, or information of this nature which was furnished by them with respect to the invoices and orders.

Q. Now, I show you Commission's Exhibit 835-B, and the information which appears under the columns headed, "Date," and "Entered," and "Shipped," with reference to the customer's order. Who filled in that information?

A. Well, I did, or one of the men working under my direction. Not all the sheets were initialed.

Q. I call your attention to the fact that the sheets under Commission's Exhibits 835-B through 835-S relate

1514 to transactions from the Cleveland branch of The Glidden Company. Did you enter the material under those three columns as to the sheets from the Cleveland branch, and also the information appearing under "Contracts and other references," on those sheets?

A. I do not see the words "Cleveland branch." Where are they?

Q. It is under this heading (indicating).

A. Well, if my memory serves me right, these references were to previous Exhibits 772 to 772-S, did show information which indicated they emanated from the Cleveland branch.

Q. Mr. Depue, were the invoices from the Cleveland branch ever supplied to you for the purpose of entering or information?

Mr. Welch: You mean the supplemental evidence?

Mr. Wright: The supplemental evidence, data or information, appearing through 835-B through 835-S.

The Witness: Now, if my memory serves me right, we were furnished with excerpts of the invoices instead of the invoices themselves.

By Mr. Wright:

Q. Was that true as to the Cleveland branch?

A. No, I think as far as the Cleveland branch is concerned, we were furnished the invoices, and so far as—well, we haven't come to that yet. Is this part of the exhibit?

Q. This is part of the exhibit, the portion from T through.

A. Well, to the best of my memory, those which purport to emanate from the Cleveland branch, we had invoices for, and as for those which came from the Houston lead company, I think we were furnished with excerpts of invoices. We were furnished with either invoices or excerpts therefrom by the companies, or any of them. I think one batch was not sent in here, because they did not want to remove them from their files, and they sent us copies containing the pertinent information.

1515

Mr. Wright: May we go off the record for a moment? I would like to confer with counsel.

Trial Examiner Norwood: Certainly. Off the record.

(Discussion off the record.)

Mr. Hinds: Inasmuch as Glidden does not question that the data has been correctly prepared, subject, of course, to correction if we find any errors, and since we do not question the competency of this document, will concede that it does show what it purports to show; namely, this supplemental information to supplement the original tabulation, tending to overcome to a considerable extent the original objection that I made, that it lacked the pertinent data.

Does that help you any?

Mr. Wright: Yes, sir.

By Mr. Wright:

Q. Mr. Depue, with reference to the sheets relating to the Cleveland office of Glidden, do you recall how
1516 that information was secured? Well, I withdraw the question.

Mr. Wright: In view of the statement of Mr. Hinds, I will now offer Commission's Exhibits 835-A through 835-Z-21 in evidence.

Mr. Hinds: I want to ask one or two questions.

Trial Examiner Norwood: Yes, go ahead.

Mr. Hinds: I notice that on sheets 27 and 37, and perhaps other title page sheets, you use the expression, "Houston Lead Sub. of Glidden." You understand that Houston Lead is a division of the Glidden Company and not a subsidiary, do you not? I just want to have that corrected. You concede that, don't you?

Mr. Wright: I will concede that.

The Witness: The Houston Lead—

Mr. Hinds: (Interposing.) Never mind, he has conceded it.

I also note in the far right-hand column in many of these sheets there is a special consignment billing. Does that refer to a billing by Glidden to a consignee, or a billing by the consignee out of the consignment stock?

The Witness: It is a billing by the company to the consignee.

Mr. Hinds: In view of that statement, while not making any objection to the competency of the document, to the limited extent that it includes billings from
1517 Glidden to its own consignee, I object on the ground that the document obviously has no relevancy. Now, I believe it is not claimed as to each one of them that it constitutes an individual discrimination, and therefore, to the extent that it lists transactions which are not claimed to be discriminatory, I object on the ground of materiality. But I shall not press that objection, if I can be assured that, in good season, so we could prepare our case, we shall be advised by the counsel for the Commission as to which items their claim is made on of discrimination.

Other than that, I have no objection to the offer.

Trial Examiner Norwood: Any further objection? What do you say, Mr. Wright?

Mr. Wright: We have been over the ground of Mr. Hinds' objection before, on numerous occasions. I submit this is supplementary information on a competent exhibit which is already in the record, and that it should be admitted on the limited proffer, which I might say is the same as that which related to the other previous exhibits of this same sort.

Mr. Hinds: This is the first opportunity I have had since the time when the tabulation was completed, to call for what a court of law would call a bill of particulars, so we would know what the issues are. I hereby make that request. I assume it will be complied with by the counsel. We have already made the request in writing several days ago.

1518 Trial Examiner Norwood: Objection overruled. The exhibits are received for the purposes mentioned. Commission's Exhibits 835-A through 835-Z-21, are received in evidence.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 835-A, 835-B, 835-C, 835-D, 835-E, 835-F, 835,G, 835-H, 835-I, 836-J, 835-K, 835-L, 835-M, 835-N, 835-O, 835-P, 835-Q, 835-R, 835-S, 835-T, 835-U, 835-V, 835-W, 835-X, 835-Y, 835-Z, 835-Z-1, 835-Z-2, 835-Z-3, 835-Z-4, 835-Z-5, 835-Z-6, 835-Z-7, 835-Z-8, 835-Z-9, 835-Z-10, 835-Z-11, 835-Z-12, 835-Z-13, 835-Z-14, 835-Z-15, 835-Z-16, 835-Z-17, 835-Z-18, 835-Z-19, 835-Z-20, and 835-Z-21, were received in evidence.)

Mr. Wright: At this time, your Honor, I have no further questions of this witness. I would like to have him recalled later in the day.

Trial Examiner Norwood: Any cross-examination on anything up to this time?

Mr. Ewing: No cross.

Mr. Hinds: I will not have any cross.

Trial Examiner Norwood: Then you may be discharged, and you can call him again if you want to. Call your next witness.

Mr. Hinds: I would like to ask a question. Is it conceded that those items which are marked "Memo
1519 billings", that those are also billings to a consignee and not billings by the consignee? I should have included that in my other question.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: If and to the extent that "Memo billings" refers to a billing to an agent or consignee of The Glidden Company, I make the same objection as I did with respect to consignment billing.

Trial Examiner Norwood: The ruling will be the same.

Mr. Ewing: Counsel for the Commission has called my attention to the subpoena dated, I believe, June 26, 1946, or returnable on that date, in New York, served on National Lead Company, comprising, among other things, two specifications, and with respect to Specification 2 which relates to certain contracts referred to therein, I produce the original letter from Alexander and Green to Mr. Wright, dated July 26, 1946, which he has just handed to me, which relates to compliance by National Lead with Specification 2 of that subpoena. I also produce photostatic copies of the records and other papers referred to in that letter and submitted by National Lead in compliance with Specification 2 of that subpoena.

1520 I further produce a letter from Alexander and Green to Mr. Wright dated September 17, 1946 which has further reference to our letter of July 26, 1946, which letter of September 17, 1946 has just been handed to me by Mr. Wright.

Mr. Wright: Your Honor, I ask that the records produced under Specification 2 of the subpoena be marked for identification as Commission's Exhibits 834-A through 834-Z-14.

(The documents referred to were marked Commission's Exhibits 834-A, 834-B, 834-C, 834-D, 834-E, 834-F, 834-G, 834-H, 834-I, 834-J, 834-K, 834-L, 834-M, 834-N, 834-O, 834-P, 834-Q, 834-R, 834-S, 834-T, 834-U, 834-V, 834-W, 834-X, 834-Y, 834-Z, 834-Z-1, 834-Z-2, 834-Z-3, 834-Z-4, 834-Z-5, 834-Z-6, 834-Z-7, 834-Z-8, 834-Z-9, 834-Z-10, 834-Z-11, 834-Z-12, 834-Z-13 and 834-Z-14 for identification.)

Mr. Wright: I offer Commission's Exhibit 834-A through 834-Z-14 in evidence.

Trial Examiner Norwood: Any objection?

Now, what are these, Mr. Wright?

Mr. Wright: I might say that the purpose of the offer is to show the transactions by the National Lead Company and the records of transactions in lead pigments over the periods of time specified in those documents.

1521 Tral Examiner Norwood: Are these customer cards or account sheets?

Mr. Wright: Your Honor, at that point, I am not able to identify absolutely those documents. The subpoena does call for contracts. These were submitted by the National Lead Company in response to Specification 2 of the subpoena as contracts with those customers.

Mr. Ewing: They were submitted, if I might make a slight correction, as copies of records of the National Lead Company relating to contracts.

Trial Examiner Norwood: I see.

Mr. Ewing: The contracts either having been destroyed or being not found, with the exception of three which are on printed forms headed "Dry Pigment Contract." They are, all three, headed "Dry Pigment Contract", which may or may not be, as far as their form is concerned, contracts. In any event they are records.

We object to them on the ground that they are cumulative, irrelevant and immaterial, and because they relate to the years 1936 and 1937 or prior thereto, with the exception of one which appears to have been entered into January 2, 1942.

Mr. Wright: In that connection, your Honor, I will state that the complaint contains allegations regarding contracts for dry pigment entered into by these re-
1522 spondents, and since these documents were produced by the National Lead Company either as contracts or as records relating to contracts covering lead pigment during the period of time covered by the complaint, they certainly would be relevant and competent. I assume that counsel does not mean to object because of the fact that they are copies rather than original documents.

Mr. Ewing: Oh, no.

Trial Examiner Norwood: Well, what do you want to show by these?

Mr. Wright: For one thing, I want to show the return that was made on the subpoena calling for contracts by the National Lead Company over these periods of time.

Secondly, I want to show what appears on those documents regarding the transactions in the sale and shipment of lead pigment and prices and arrangements so far as they appear on those records.

Mr. Ewing: Of course, the documents show whatever information appears on them, but there is nothing either in the documents themselves or in the offer or in counsel's statement just made to indicate for what purpose they are offered.

Mr. Wright: The purpose for which they are offered is to show the contractual relationship which existed between those customers and the National Lead Com-
1523 pany at those times, and insofar as it appears on the documents, the shipments that were made under those contracts and the prices that were charged.

Mr. Ewing: The existence of a contractual relationship or the existence of any particular price is wholly immaterial and irrelevant, unless it is related to some particular charge made by the Commission here.

Mr. Wright: Certainly the complaint covers the quoting and charging of uniform delivered prices.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits marked 834-A to 834-Z-14.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 834-A, 834-B, 834-C, 834-D, 834-E, 834-F, 834-G, 834-H, 834-I, 834-J, 834-K, 834-L, 834-M, 834-N, 834-O, 834-P, 834-Q, 834-R, 834-S, 834-T, 834-U, 834-V, 834-W, 834-X, 834-Y, 834-Z, 834-Z-1, 834-Z-2, 834-Z-3, 834-Z-4, 834-Z-5, 834-Z-6, 834-Z-7, 834-Z-8, 834-Z-9, 834-Z-10, 834-Z-11, 834-Z-12, 834-Z-13, and 834-Z-14, were received in evidence.)

Mr. Wright: Your Honor, counsel for Anaconda Copper Mining Company and International Smelting and Refining Company has, I believe, a statement that he wishes to make regarding the business of the Anaconda Com-
1524 pany and International Smelting and Refining.

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: If your Honor please—

Trial Examiner Norwood: Mr. Gardiner.

Mr. Gardiner: At the time of the Cleveland hearing respondents were requested to produce certain witnesses. They were not to be produced at this particular time. At the discretion of the attorney for the Commission it was agreed if we would make a statement as to the information that they expected to receive from these witnesses when they testified, that we would be excused from producing them. Such a statement was agreed upon. The attorney for the Commission outlined the material, or outlined the series of questions the answers to which would give them the desired information. A memorandum was worked up answering those questions, submitted to the attorney for

the Commission, and following suggestions certain revisions were made, and the final draft of that memorandum has been prepared. Now, I have that here. This memorandum is on the facts covering the production of lead pigments at East Chicago, Indiana, by the International Smelting and Refining Company and its predecessors. It could be read into the record, if that is the pleasure of the Examiner.

Trial Examiner Norwood: Or make it an exhibit.

Mr. Wright: Off the record.

1525 (Discussion off the record.)

Trial Examiner Norwood: Will it appear there that you stipulate that the witnesses would swear to that if produced?

Mr. Wright: As I understand it, this is a statement of facts by the Anaconda Company and the International Smelting and Refining Company regarding their business.

Mr. Gardiner: That is correct.

Trial Examiner Norwood: That is a stipulation of facts?

Mr. Gardiner: Yes.

Mr. Wright: It is a unilateral statement, your Honor.

Trial Examiner Norwood: I think exhibits are just as safe as the other, and it would save the respondents some money.

Mr. Gardiner: Well, we are certainly agreeable to its being introduced in any manner desired, but that would seem to be the way to do it.

Trial Examiner Norwood: The document just described, consisting of the statement of facts, which is agreed to by counsel, as produced and described by him, may be received as Commission's Exhibits 836-A through 836-N.

(The document referred to was marked as COMMISSION'S EXHIBIT 836-A, 836-B, 836-C, 836-D, 836-E,
1526 836-F, 836-G, 836-H, 836-I, 836-J, 836-K, 836-L, 836-M and 836-N, and received in evidence.)

Mr. Wright: Mr. Gardiner, am I correct in my understanding that Exhibit 836-A through 836-N comprises a statement of facts by the Anaconda Copper Mining Company and International Smelting and Refining Company for the purpose of this proceeding?

Mr. Gardiner: Yes, that is correct.

Mr. Wright: And if witnesses were called from among

the officials of those respondents they would testify to this effect, if they had appeared on the stand?

Mr. Gardiner: That is correct.

Mr. Wright: May we have a short recess?

Trial Examiner Norwood: Yes.

(A short recess was taken.)

Mr. Wright: Your Honor, I would like to request that these documents be marked for identification as Commission's Exhibits 833-A through 833-Z-100. These documents are photostatic copies of the first page of various invoices of the Sherwin-Williams Company which are listed in the tabulation which is Commission's Exhibit 794, with sub-numbers. In some instances, such as Commission's Exhibit (for identification) 833-Z-25-A, the documents are photostatic copies of slips prepared by the Sherwin-

1527 Williams Company and attached to the invoices showing the gross weight of the lead pigments involved in this transaction, the freight rate applicable to the lead pigments and the carrier:

(The documents referred to were marked Commission's Exhibit 833-A, 833-B, 833-C, 833-D, 833-E, 883-F, 833-G, 833-H, 833-I, 833-J, 833-K, 833-L, 833-M, 833-N, 833-O, 833-P, 833-Q, 833-R, 833-S, 833-T, 833-U, 833-V, 833-W, 833-X, 833-Y, 833-Z, 833-Z-1, 833-Z-2, 833-Z-3, 833-Z-4, 833-Z-5, 833-Z-6, 833-Z-7, 833-Z-8, 833-Z-9, 833-Z-10, 833-Z-11, 833-Z-12, 833-Z-13, 833-Z-14, 833-Z-15, 833-Z-16, 833-Z-17, 833-Z-18, 833-Z-19, 833-Z-20, 833-Z-21, 833-Z-22, 833-Z-23, 833-Z-24, 833-Z-25, 833-Z-26, 833-Z-27, 833-Z-28, 833-Z-29, 833-Z-30, 833-Z-31, 833-Z-32, 833-Z-33, 833-Z-34, 833-Z-35, 833-Z-36, 833-Z-37, 833-Z-38, 833-Z-39, 833-Z-40, 833-Z-41, 833-Z-42, 833-Z-43, 833-Z-44, 833-Z-45, 833-Z-46, 833-Z-47, 833-Z-48, 833-Z-49, 833-Z-50, 833-Z-51, 833-Z-52, 833-Z-53, 833-Z-54, 833-Z-55, 833-Z-56, 833-Z-57, 833-Z-58, 833-Z-59, 833-Z-60, 833-Z-61, 833-Z-62, 833-Z-63, 833-Z-64, 833-Z-65, 833-Z-66, 833-Z-67, 833-Z-68, 833-Z-69, 833-Z-70, 833-Z-71, 833-Z-72, 833-Z-73, 833-Z-74, 833-Z-75, 833-Z-76, 833-Z-77, 833-Z-78, 833-Z-79, 833-Z-80, 833-Z-81, 833-Z-82, 833-Z-83, 833-Z-84, 833-Z-85, 833-Z-86, 833-Z-87, 833-Z-88, 833-Z-89, 833-Z-90, 833-Z-91, 833-Z-92, 833-Z-93, 833-Z-94, 833-Z-95, 833-Z-96, 833-Z-97, 833-Z-98, 833-Z-99, 833-Z-100, for identification.)

1528 Mr. Wright: I would also like to have marked for identification a document as Commission's Exhibit

837, which is a rough index prepared by me showing the invoice numbers of the documents comprising Commission's Exhibit 833, with subnumbers, keying them wherever possible with the page number of Commission's Exhibit 794 in which the transactions are recorded.

Also on Commission's Exhibit 837 for identification is a list of the number of pages comprising the entire invoice, since the document in Commission's Exhibit 833 with subnumbers consists only of the first sheet of an invoice of, in many instances, more than one sheet.

(The document referred to was marked Commission's Exhibit 837 for identification.)

Mr. Wright: I would like to ask counsel for the Sherwin-Williams Company if he will stipulate that the document comprising Commission's Exhibits 833 with subnumbers are reproductions of the original records of the Sherwin-Williams Company, original invoices, and also as to the identity of Commission's Exhibit 837 which was prepared by Commission's counsel merely to serve as an index to the document in Commission's Exhibit 833 with subnumbers?

Mr. Welch: Counsel for Sherwin-Williams is willing to so stipulate, and in connection with the offer of these exhibits wishes to make an additional statement.

1529 Counsel for Sherwin-Williams states that the policy of the company with respect to freight is as was stated by the witness S. B. Coolidge at pages 1314 to 1332, inclusive, of the transcript in this case, but that upon further investigation by the witness Coolidge and other officials of the company, it has been ascertained that various divisions of the company have in fact sold and shipped various lead pigments to customers located at destinations other than those listed on Commission's Exhibits 594-A and -B, upon a freight prepaid, freight allowed or freight equalized basis, so that some customers located at points other than those listed on said Commission's Exhibit 594-A and -B have not in fact been sold at a delivered price derived by adding to the card price the freight from one of the listed points on Commission's Exhibit 594-A and -B to the destination, and consequently the witness Coolidge has requested that his testimony be corrected to conform to the foregoing statement.

It is further stated that these practices were not known to the witness Coolidge or to other executive officers of

the Sherwin-Williams Company at the time of his testimony in this matter on July 25, 1946, and that such practices have been at variance with the executive policy of the company, as evidenced by copies of price cards nad price announcements, which have been introduced in evi-
1530 dence as Commission's exhibits.

It is further stated that the photostatic copies of the invoices which are now identified as Commission's Exhibits 833-A to 833-Z-100 are genuine, authentic reproductions of invoices or of one or more pages of invoices consisting of a number of pages, which have been retained by the Sherwin-Williams Company as records of the transactions to which they relate.

Counsel for the Sherwin-Williams Company waives objection, therefore, to the offer in evidence of Commission's Exhibits 833-A through 833-Z-100, and Commission's Exhibit 837.

Mr. Wright: I offer the documents marked Commission's Exhibits for identification 833-A through 833-Z-100 and Commission's Exhibit 837 in evidence.

Mr. Welch: I take it, Mr. Wright, that it is understood between counsel for the Sherwin-Williams Company and counsel for the Commission that in the event some of the invoices in Commission's Exhibit 833-A through 833-Z-100 should show on their face that the shipment was not on an f. o. b basis, or not on a freight allowed basis or equalized basis, that that exhibit will not be so considered.

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. Wright: Of course, the invoices in the exhibit could only show what they do show.

1531 Mr. Welch: That is right.

Mr. Wright: I haven't made any statement other than that.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: The objection is overruled and Commission's Exhibits 833-A through 833-Z-100 are received in evidence.

Mr. Welch: Your Honor, there was no objection to those exhibits. I would appreciate the record being corrected to that effect.

Trial Examiner Norwood: I think there was some sort of basic objection to all this material relating back to the receipt of the original invoices, or something.

Mr. Welch: I think there is a blanket objection to all, the same as the prior Exhibit 794—or whatever it was.

Trial Examiner Norwood: That is clear. Exhibits 833-A through 833-Z-100 are received in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 833-A, 833-B, 833-C, 833-D, 833-E, 833-F, 833-G, 833-H, 833-I, 833-J, 833-K, 833-L, 833-M, 833-N, 833-O, 833-P, 833-Q, 833-R, 833-S, 833-T, 833-U, 833-V, 833-W, 833-X, 833-Y,
1532 833-Z, 833-Z-1, 833-Z-2, 833-Z-3, 833-Z-4, 833-Z-5, 833-Z-6, 833-Z-7, 833-Z-8, 833-Z-9, 833-Z-10, 833-Z-11, 833-Z-12, 833-Z-13, 833-Z-14, 833-Z-15, 833-Z-16, 833-Z-17, 833-Z-18, 833-Z-19, 833-Z-20, 833-Z-21, 833-Z-22, 833-Z-23, 833-Z-24, 833-Z-25, 833-Z-26, 833-Z-27, 833-Z-28, 833-Z-29, 833-Z-30, 833-Z-31, 833-Z-32, 833-Z-33, 833-Z-34, 833-Z-35, 833-Z-36, 833-Z-37, 833-Z-38, 833-Z-39, 833-Z-40, 833-Z-41, 833-Z-42, 833-Z-43, 833-Z-44, 833-Z-45, 833-Z-46, 833-Z-47, 833-Z-48, 833-Z-49, 833-Z-50, 833-Z-51, 833-Z-52, 833-Z-53, 833-Z-54, 833-Z-55, 833-Z-56, 833-Z-57, 833-Z-58, 833-Z-59, 833-Z-60, 833-Z-61, 833-Z-62, 833-Z-63, 833-Z-64, 833-Z-65, 833-Z-66, 833-Z-67, 833-Z-68, 833-Z-69, 833-Z-70, 833-Z-71, 833-Z-72, 833-Z-73, 833-Z-74, 833-Z-75, 833-Z-76, 833-Z-77, 833-Z-78, 833-Z-79, 833-Z-80, 833-Z-81, 833-Z-82, 833-Z-83, 833-Z-84, 833-Z-85, 833-Z-86, 833-Z-87, 833-Z-88, 833-Z-89, 833-Z-90, 833-Z-91, 833-Z-92, 833-Z-93, 833-Z-94, 833-Z-95, 833-Z-96, 833-Z-97, 833-Z-98, 833-Z-99 and 833-Z-100, were received in evidence.)

Mr. Wright: Your Honor, was Exhibit 837 received?

Trial Examiner Norwood: Yes, it is now received. Commission's Exhibit 837 is also received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 837, was received in evidence.)

Mr. Wright: Your Honor, the next witness was 1533 called for 2 o'clock.

I suggest we take a recess now until that hour.

Trial Examiner Norwood: Is there any objection? If not, we will recess until 2 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.)

1534 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Come to order, please.
Mr. Wright: I will call Miss Meyer.

HELENA MEYER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Miss Meyer, will you state your name and position?
A. I am Helena Meyer, Mineral Economist of the Bureau of Mines, United States Department of Interior.
Q. What are your duties in that position, Miss Meyer, generally?
A. In connection with lead and zinc pigments and other things, too. We compile figures from individual companies, confidential figures, which we summarize and distribute publicly.
Q. Miss Meyer, you say you receive these figures. Do they come from the producers?
A. They come directly from the producers.
Q. Lead and zinc pigments. Do you check the statistics on a monthly basis or an annual basis?
A. In connection with lead pigments, on an annual basis only.
Q. I see. Are reports made of production?
1535 A. Production.
Q. Shipments?
A. Yes, sir, and distribution.
Q. Do they show the value of products?
A. Yes.
Q. Does the Bureau make any publication of reports based on these statistics?
A. Yes. The principal publication is Minerals Yearbook.
Q. Does that book have a chapter devoted to lead and zinc pigments?
A. Yes, that is right.

Q. Does that chapter outline all the statistics and information concerning that industry?

A. Well, we try to have it do that.

Q. I show you a document and ask you if you recognize that as the Minerals Yearbook for 1942.

A. That looks like it all right.

Q. I call your attention to page 205 reading "Lead and zinc pigments and zinc salts", by H. M. Meyer and A. W. Mitchell. Are you the H. M. Meyer whose name appears there?

A. Yes.

Q. Miss Meyer, how long has the Bureau of Mines been collecting such statistics from the producers?

A. I think it is 1880. However, we have some figures earlier than that that were compiled from the best sources available.

1536 The Bureau of Mines has been in existence since 1910. The predecessor was the U. S. Geological Survey, as far as this information was concerned.

Q. There has been a continuous collection by one agency over that period of time?

A. That is right.

Q. I direct your attention to this document and ask you if you recognize that as a copy of the 1931 Minerals Resources of the United States, Part 1, Metals?

A. Yes, that is the predecessor of the Minerals Yearbook.

Q. I direct your attention to pages 220 and 221 of that volume at the section headed "Producers and Plants". Under the heading "White Lead" there is a list of companies. Under "Lead Sulphate" there is another list, and under "Red Lead" there is another list, and under "Orange Mineral" there is another list, and under "Litharge" there is another list.

Does the Bureau have records showing what companies have reported over a considerable period of time?

A. Yes, it does.

Q. Are you thoroughly familiar with those records yourself?

A. I think I am.

Q. Miss Meyer, do you recognize the Carter White Lead Company as having reported production or shipment of white lead?

Mr. Ewing: I object to that. Individual reports are

1537 confidential, as I understand it.

Trial Examiner Norwood: Well, he just asked if they did report.

Mr. Wright: Yes, sir, Your Honor. I wasn't intending by that question or do not intend by any subsequent questions to bring out any confidential statistics reported by any producers.

Trial Examiner Norwood: I don't believe this witness would tell you, anyway.

Mr. Wright: This witness has already identified a list of producers as published in Minerals Resources.

Trial Examiner Norwood: Objection overruled.

The Witness: Carter White Lead Company, I think, was the name of the company sending in reports.

By Mr. Wright:

Q. Do the records show when that company started sending reports?

A. I don't know when they started. Our records show them as having reported in 1903.

Q. When was your last report from that company?

A. The last report was 1920.

Q. Do you recall what plants that company reported?

A. We have the location only of Chicago, Illinois.

Q. Do the records of the Bureau indicate that Wetherill & Bros. of Philadelphia reported production or ship-
1538 ment of lead pigments?

A. Yes, they have, too.

Q. When did that company start reporting?

A. This may not be the original. Our records show only back to 1903 in each case.

Q. They did report in 1903?

A. Yes, over the period of 1903 to 1933.

Q. What pigments were reported as having been produced?

A. These pigments may not have been reported for each year, but over the period there was reported white lead, litharge, and orange mineral.

Q. Now, going back to Carter—what pigments were reported?

A. White lead.

Q. Your records show the reporting of production of lead pigment by Evans Lead Company?

A. Yes, beginning with 1922.

Q. And going over what period of time?

A. As Evans Lead only to 1927, and then Evans-Wallower, and that covered 1930.

Q. Up through 1930?

A. Yes.

Q. Now, have any of those companies reported as separate individual entities since those dates?

A. No, they have not.

Q. What pigments did Evans and Evans-Wallower report?

1539 A. Over the period, red lead, litharge, and orange mineral. It is possible in some of these years there was no production reported or maybe only purchases, but the record covers that period.

Q. In the chapter on Lead and Zinc Pigments and Zinc Salts, appearing in the Minerals Yearbook for various years, is it customary for the Bureau to include a section on prices of lead pigment for the year?

A. Yes.

Q. From what source does the Bureau get the price data on lead pigments?

A. I don't know that the list goes all the way back, but for a number of years we have been using Oil, Paint and Drug Reporter.

Q. That is the trade magazine, Oil, Paint and Drug Reporter of New York?

A. Yes.

Q. Now, Miss Meyer, have you also worked at times on the sections of the Minerals Yearbook and Minerals Resources regarding pig lead?

A. Yes, I have.

Q. Do they show similar statistics on production and prices of pig lead?

A. Yes.

Q. I believe you already referred to this Minerals
1540 Yearbook for 1942. I call your attention to the section on Lead on page 173 entitled "Average Monthly and Yearly Quoted Prices of Lead at St. Louis, New York, and London, 1938 to 1942 in Cents per Pound".

Will you state what figures are reported continuously for each month from April through December of 1941 on page 173 of that book?

A. St. Louis or New York?

Q. New York.

A. You want me to read them all?

Q. From April on through to December, 1941.
A. April, 5.07.
Q. No, 1941.
A. I am sorry. April, 1941, 5.85 through December, 1941.
Q. That same price obtained?
A. Yes.
Q. How about the price at St. Louis in that period?
A. That is unchanged at 5.70.
Q. That is in cents per pound?
A. In cents per pound.
Mr. Wright: I have no further questions.
Trial Examiner Norwood: Cross-examine.
Mr. Ewing: No cross-examination.

Cross-Examination by Mr. Wood.

1541 Q. In respect to these reports in respect to which you have been testifying, do you have any reason to know that any of them are accurate?
A. That what?
Q. Do you have any reason to know that any of these reports in respect to which you have been testifying, that any of them are accurate?
A. That would depend on the companies, of course. We think that most of the reports we get are accurate.
Q. You think so?
A. Yes.
Q. But do you know whether any of them are accurate yourself?
A. I don't guess I do, no.
Mr. Wood: That is all.
Mr. Ewing: Your Honor, I move to strike all the testimony on the ground that the witness testified that she doesn't know whether they are accurate, and on the further ground that they are irrelevant and immaterial.
Mr. Wright: Your Honor, we have here an official of the Bureau of Mines who compiled statistics which were furnished on, I believe it was testified to, a purely voluntary basis, by the Respondents and other producers in this field; and no attempt was made to bring out the accuracy of any of the reports as to production.
The only testimony was as to the receipt of the
1542 reports by certain of the Respondents and how cer-

tain of the information was complied, and the effect of certain information on pig lead prices.

Trial Examiner Norwood: Well, Miss Meyer, could you verify any of these or does your department or division verify any of these or can you state that they are fairly reliable?

The Witness: We make every effort to check the information we receive on the basis of the best information we can get. We have every reason to think through much correspondence that the reports are accurate.

Mr. Wood: The witness has testified that she didn't know whether they are accurate or not. Her state of mind, whether she trusts people or believes people—that has nothing to do with the case.

Trial Examiner Norwood: Motion denied.

Mr. Wright: I have nothing further of this witness, Your Honor.

Trial Examiner Norwood: Is there anything further of this witness? If not, you are excused, Miss Meyer.

(Witness excused.)

Mr. Wright: May we take a five-minute recess, Your Honor?

Trial Examiner Norwood: Five-minute recess.

(A short recess was taken.)

1543. Mr. Wright: I would like to recall Mr. Depue to the stand.

Trial Examiner Norwood: Carl H. Depue recalled.

CARL DEPUE resumed the stand and testified further as follows:

Direct Examination by Mr. Wright.

Q. Mr. Depue, I believe we had reached a point in your testimony this morning where we were discussing Commission's Exhibit 826-A through Y. I believe it was discovered that there were one or two references to the corresponding pages of Exhibit 794, which had been omitted.

Have you subsequently filled in the reference to Commission's Exhibit 794 in Commission's Exhibit 826?

A. Yes. One sheet refers to 794-K and another to 794-T. The 794-K is 826-I. 794-T is 826-P.

In those instances the letter following the 794 was missing.

Q. Now, as I uderstand your testimony, that exhibit comprises information taken off the original invoice records of the Sherwin-Williams Company about the transactions listed in Commission's Exhibit 794. Is that correct?

A. That is correct.

Q. And if shows, does it, as far as it was able to 1544 be ascertained from those invoices, the date of the customer's order and whether or not the transaction related to any contract or special arrangement?

A. Yes, and if it showed the date of shipment, that is shown on these sheets.

Mr. Wright: Your Honor, I offer Commission's Exhibit 826-A through Y into evidence.

Trial Examiner Norwood: Any objection?

Mr. Welch: Your Honor, we have the same general objection that was had to 794 itself, but no further objection.

Trial Examiner Norwood: Received as marked. Objection overruled.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 826-A, 826-B, 826-C, 826-D, 826-E, 826-F, 826-G, 826-H, 826-I, 826-J, 826-K, 826-L, 826-M, 826-N, 826-O, 826-P, 826-Q, 826-R, 826-S, 826-T, 826-U, 826-V, 826-W, 826-X and 826-Y was received in evidence.)

Mr. Wright: I have no further questions of this witness.

Mr. Welch: No questions.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Mr. Wright: I would like to ask counsel for Eagle-Picher if he is prepared to make a return to these 1545 subpoena duces tecum, which is returnable today.

Mr. Wood: Mr. Hayt and Mr. Zoller of the Eagle-Picher Company have come to Washington in order to save the whole group the trouble of coming to Cincinnati. They are offered as witnesses of Mr. Wright by his request and by agreement.

Mr. Wright: Your Honor, I would like to request that these documents be marked for identification as Commission's, Exhibit 838-A through I.

Am I correct in my understanding, Mr. Wood, that these are the price cards which are returned in accordance with the subpoena?

Mr. Wood: Yes, that is my understanding. Mr. Serviss produced those from the company records.

Trial Examiner Norwood: The exhibit will be marked for identification as requested.

(The documents referred to were marked COMMISSION'S EXHIBIT 838-A, 838-B, 838-C, 838-D, 838-E, 838-F, 838-G, 838-H and 838-I, for identification.)

Mr. Wright: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 2:35 o'clock p. m., a recess was taken until 10:00 o'clock a. m. Thursday, October 3, 1946.)

1546

Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
Thursday, October 3, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

James T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N. W., Washington, D. C.), attorney for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Park & Whiteside, 25 Broadway, New York, N. Y.,) attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., and Edmund P. Wood, Esq., attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

James D. Ewing, Esq. and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), attorneys for National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), attorney for The Glidden Company.

1547 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened, at 10 o'clock a. m., the 3rd day of October, 1946, in Room 332, Federal Trade Commission Building, Washington, D. C.

Enter the appearances.

(The appearances are as noted at the title page.)

Trial Examiner Norwood: Proceed.

Mr. Wright: I want to call Mr. Hayt.

WILLIAM H. HAYT, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. State your name, please.

A. William H. Hayt.

Q. Mr. Hayt, what is your present occupation?

A. I am the general manager of the White Lead Division of the Eagle-Picher Company.

Q. When was your first employment with Eagle-Picher? Will you state that, and then give chronologically your services with the company up to the present time?

A. I was first employed by them in November, 1914.

1548 That was by the predecessor of the present company, the Picher Lead Company. I was originally salesman, and then a division sales manager, and then subsequently a division manager.

Q. Over what period of time were you division manager or division sales manager?

A. I was division sales manager from 1931 to about 1937, and division manager from 1937 up to the present time.

Q. Now, as division sales manager, what were your duties?

A. Well, I was responsible for the sales of certain of the products in what they call the Western Sales Division at that time.

Q. What products were those?

A. They consisted of white lead in oil and lead pigments and metal products.

Q. What did that Western Division consist of?

A. Roughly, the territory from Detroit to the Pacific Coast, and from Minneapolis to Kansas City.

Q. I take it, then, that you are thoroughly familiar with the practices in the lead pigment business, particularly white lead in oil, over a considerable period of time.

A. That is right.

Q. Mr. Hayt, I show you Commission's Exhibit 586, which has been identified as a map, showing zone boundaries of white lead in oil differentials supplied by you to Mr. Dunn, of the Federal Trade Commission, under date of January 1, 1937. Will you state what products
1549 have been sold by Eagle-Picher on the basis of that map?

A. Principally white lead in-oil and what we term dry products in kegs, which covers pigments such as red lead and litharge in packages, from 100 pounds down.

Q. In other words, keg products?

A. That is right.

Q. That would be pigments that you sell in 100-pound kegs, or 50-pound kegs, or 25-pound kegs?

A. 100-pound kegs or less.

Q. That would include red lead in-oil and dry red lead?

A. Yes.

Q. And litharge, that is always dry, is it not?

A. That is right.

Q. Does that include basic sulphate of lead?

A. Basic sulphate of lead was never sold.

Q. Basic carbonate, both dry and in-oil?

A. Basic carbonate.

Q. And was this zone map and differentials that are set forth on it; used by Eagle-Picher from 1937, January 1, 1937, on?

A. You mean was 1937 the beginning?

Q. Let me withdraw that question. Do you presently sell these products on the basis of similar zones and differentials?

Mr. Wood: I object to the question on the ground that the word "similar" makes the question indefinite.

1550 Mr. Wright: I will amend the question by substituting "same" for similar.

The Witness: Will you repeat the question, please?

By Mr. Wright:

Q. Do you now sell these products on the basis of the same zones and the same differentials?

A. Substantially so, yes.

Q. What differences are there?

A. At times the zones may be modified at borderlines, in order to meet the competitive situations.

Q. Will you state what modifications have been made since January 1, 1937?

A. No, I cannot, nor can I say definitely that there have been any since that period, but the zone map was always in more or less a state of flux.

Q. But you do not recall any since January 1, 1937?

A. I do not recall whether there have been any specific ones since then, no.

Q. Then it would be fair to state you sold on substantially that division of territories, and those differentials since that time?

A. With possibly some minor exceptions.

Q. Which you do not recall?

A. That is right.

Q. Now, Mr. Hayt, for how long a time, prior to 1551 January 1, 1937, were those particular zones and those differentials employed by Eagle-Picher?

A. I think the zone system was established about 1933, but I am not sure of that.

Q. Do you recall what time in 1933?

A. No, I do not.

Q. Was it late in 1933?

A. No, I could not tell you. I was in Chicago at the time and was not responsible for the installation of the zone setup.

Q. Well, now, do you recall the zones and differentials that were employed in 1934?

A. Well, I can only say that I think they were substantially the same as this (indicating).

Q. There might have been some modifications?

A. The borderline points of certain towns would be in one zone at one time and another zone at another time.

Q. You stated that the zone system was first employed during 1933. What method of quoting did Eagle-Picher employ prior to 1933?

A. They had a rather elaborate system of what we called jobbing, and equalization points.

Q. How did you quote prices on those?

A. The jobbing points were set up where Eagle-Picher had a jobber, and sales to any point other than that
1552 were equalized with the jobbing point. That is to say, the distributor paid the freight from the jobbing point, regardless of where the shipment might have originated.

Q. And there were numerous jobbing points, were there?

A. That is right.

Trial Examiner Norwood: Were they credited to the jobber?

The Witness: Sometimes. It would all depend on whether at the jobbing point there was one jobber or more.

By Mr. Wright:

Q. Mr. Hayt, where does Eagle-Picher produce the white lead?

A. At Cincinnati, Ohio.

Q. That is the only production point of white lead?

A. Of the basic carbonate white lead.

Q. You stated you were in charge of white lead sales. Did that include basic carbonate, or does that also include lead sulphate?

A. I said I was general manager of the white lead division, and I was responsible for the production of all of the basic carbonate, but the sale of only the white lead in oil and products in kegs from 100 pounds down. The sale of the bulk basic carbonate is handled in another division of the company.

Q. I see. In the keg products which are under your supervision, red lead and litharge are produced at
1553 other points than Cincinnati, is that correct, sir?

A. Oh, yes.

Q. When you conduct business in these keg products, in red lead and litharge, are those products ordinarily shipped direct from the producing plants to the customer?

A. They may be shipped either way. Sometimes direct from the producing plant, sometimes combined with other products and shipped from an equalizing point, or at times together with products made at Cincinnati.

Q. At what points does Eagle-Picher maintain warehouses for handling that business?

A. That has varied considerably. Under present conditions, there are relatively few warehouses, and most of those are empty, but normally about 14 warehouses.

Q. Do you recall the points at which they are located?

A. Well, I cannot name all of them, perhaps, but Buffalo, Newark, New Jersey, Boston, Baltimore, Pittsburgh, Detroit, Chicago, Minneapolis, St. Louis, Kansas City, and New Orleans.

Q. Does Eagle-Picher do any business in keg products on the West Coast?

A. No.

Q. At no place on the West Coast?

A. No, I do not believe so.

Q. It has no commission agents to handle the business for them?

1554 A. No.

Q. Mr. Hayt, in selling keg products on the basis of this zone map, how do you handle the freight charge where there is an element of transportation by the carrier involved? Is customarily the freight paid by Eagle-Picher, or does the customer pay it, and an allowance made for it?

A. Generally speaking, the customer pays the freight, and an allowance is made for it.

Q. Mr. Hayt, what brands are your white lead in-oil sold under?

A. The Eagle Branch, and Hammer Brand.

Q. Is the Hammer Brand sold to dealers at the same price as the Eagle Brand?

A. No, the Hammer Brand has been consistently, I believe, sold at a quarter of a cent a pound less than the Eagle Brand.

Q. How do the resale prices suggested by Eagle-Picher Company compare on the two brands?

Mr. Wood: I object to the question. There is no evidence in the record that Eagle-Picher has any policy of controlling resale prices.

Mr. Wright: I withdraw the question, your Honor.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wright:

Q. Mr. Hayt, has the Eagle-Picher Company, in the period from 1937 to 1943, suggested to dealers the
1555 resale prices at which they sell Hammer and Eagle brands of white lead in-oil?

A. That is right.

Mr. Hinds: I object, your Honor, on the ground it is immaterial. It has been repeatedly held there is nothing

illegal about suggesting retail prices, as long as there is no agreement.

Mr. Wright: Your Honor, the only purpose of the question is to lay the foundation for the question which was objected to.

Trial Examiner Norwood: Objection overruled. Read the question and answer.

(Question and answer read by the reporter.)

By Mr. Wright:

Q. In other words, they have suggested the resale price?

A. Yes.

Q. Was there a similar differential between the suggested resale prices as to the two brands?

A. No.

Q. In other words, the dealer was requested to resell the Hammer brand at the same price?

A. He was not requested.

Q. Required?

A. He was not required.

Q. Was it suggested by Eagle-Picher that he resell at the same prices?

1556 A. That is right.

Q. Mr. Hayt, does the Eagle-Picher Company supply statistics on production and shipments of lead pigment to the Lead Industries Association?

A. Yes.

Q. Do they receive from the Lead Industries Association statistics compiled as to the whole industry showing total shipments and sales?

A. A summarized report.

1557 Q. So you were able to ascertain your exact position with reference to the remainder of the industry?

A. That is right.

Q. I call your attention to Commission's Exhibit 669, which has been identified as statistics showing the percentage of production by the various lead producers of both dry white lead and white lead in-oil for the years 1938, 1939, 1940 and 1941, produced by Mr. Wormser of the Lead Industries Association. The figures in the column under "Eagle-Picher" appear to be combined figures of dry and in-oil percentages.

Can you state the approximate percentage of production

of the Eagle-Picher Company of white lead in-oil for those four years?

A. You mean our percentage of the total business?

Q. Yes, sir.

A. Well, I feel, as has been said before in this case, that that is confidential information in the presence of competitors. I would just as soon state it without the competitors present.

Trial Examiner Norwood: I think he asked you if, from those figures, you could compute that percentage?

The Witness: I could compute it, yes, sir.

By Mr. Wright:

Q. Mr. Hayt, I call your attention to Commis-
1558 sion's Exhibit 665 and ask you if you recognize that document, which has been identified as being obtained by Mr. Dunn of the Federal Trade Commission from you, showing your dollar volume of sales of both white lead in-oil and dry white lead in 1940.

A. Yes, that is my handwriting.

Q. At that time you apparently had no reluctance to state these figures...

A. To whom.

Q. To the representative of the Federal Trade Commission.

A. I still have no reluctance to state it to the Federal Trade Commission.

Trial Examiner Norwood: You do not want to tell the world about it?

The Witness: That is right.

By Mr. Wright:

Q. Do I understand then that you refuse to state the percentage of production of Eagle-Picher during those years to the total of the industry?

A. Not to you.

Mr. Wood: If the witness is requested by the Trial Examiner to give the information he is instructed by counsel to answer the question.

Mr. Wright: Your Honor, I request that the witness
1559 be instructed to answer the question. Certainly it is relevant material and competent to the issues in this case, which involve specific charges relating to the percentages of production of the various respondents.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Trial Examiner Norwood: I will ask the counsel to reframe the question now that he wants to ask, that is, the question that elicits this information that he wants to ask about, so as to be clear.

By Mr. Wright:

Q. Mr. Hayt, will you please state the percentage of the production and sales of the Eagle-Picher Company of white lead in-oil to the total for the industry during 1938?

Trial Examiner Norwood: Now, that is the question that the witness expresses a reluctance to answer. I will hear from the counsel as to its relevancy.

Mr. Wright: Well, your Honor, the complaint in this matter charges the National Lead Company specifically with monopolizing the industry and charges the respondents as a group with a combination in restraint of trade. The complaint makes positive allegations as to the percentages of control by each of these various respondents. It is apparent that we cannot get at the heart of the issue raised by that portion of the complaint without obtaining this information from these respondents.

1560 Trial Examiner Norwood: I see.

Mr. Wright: As was testified yesterday by a representative of the Bureau of Mines these statistics have been turned over to that Bureau as confidential and they refuse to disclose them without the consent of the respondents.

Trial Examiner Norwood: I will instruct the witness to answer the question.

The Witness: What was the year involved?

Mr. Wright: 1938.

Mr. Wood: The product was white lead in-oil?

Mr. Wright: The product was white lead in-oil.

The Witness: I do not know that I can answer specifically for that year, but I can tell you approximately.

By Mr. Wright:

Q. That will be sufficient.

A. It was probably about 15 or 16 percent of the total.

Q. What about the year 1937?

A. You are drawing fine lines, as far as my memory is concerned. I would say approximately the same.

Q. Would it be fair to say, Mr. Hayt, that it has been approximately that percentage?

A. Yes.

Q. Over what period of time?

A. I would say it varied probably from between 15 and 20 percent over a period perhaps from 1930 to the present time.

1561 Q. I see.

What about with reference to dry white lead, basic carbonate?

A. About 10 percent plus or minus 2 percent either way.

Q. Would that be over the same period?

A. Yes.

Q. From 1930 on?

A. Yes.

Q. Would you know those figures in the same way with reference to basic sulphate?

A. I have nothing to do with the sale of basic sulphate.

Q. Would you know those approximate percentages as to dry red lead and red lead in-oil and keg products?

A. They are such minor factors in our total sales that it would be pretty difficult to give you any figures on those.

Q. Does Eagle-Picher also produce blue lead?

A. Yes.

Q. Is it the only producer of blue lead?

A. I believe at the present time they are the only producer. They have not always been.

Q. Is orange mineral sold as a keg product?

A. There is no sale for orange mineral in small packages.

Q. Where does the Eagle-Picher Company obtain the corroding lead that it uses in its white lead production in Cincinnati?

A. Most of it comes from the U. S. Smelting and

1562 Refining at East Chicago, Indiana.

Q. In other words, Eagle acquires its corroding lead on the open market, is that correct?

A. That is correct.

Q. Eagle is also a large producer of pig lead, is it not?

A. I would not say a large producer in relation to the general field.

Q. Its production of lead is in the dry state field, is it?

A. That is right.

Q. In and around Joplin?

A. Yes, in the Tri-state District of Missouri, Kansas and Oklahoma.

Q. Mr. Hayt, you mentioned that prior to the inauguration of the zone method you sold on warehouse and differential or equalization points. I show you Commission's Exhibits 513-C and -D which are headed "List of Differentials and Points to which They Apply in Territory East of the Mississippi"; and D, "in Territory West of the Mississippi."

Is that the type of point differential that was employed prior to the use of the zone method of Eagle-Picher?

A. I do not recall ever seeing that document before. When the job and equalization point system was in effect I was not in the white lead division, so I know about that only by hearsay, but my recollection is that the set-up was very much more involved than is indicated there.

1563 Mr. Wright: I have no further questions of this witness, your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. Wood: No cross-examination.

Trial Examiner Norwood: Thank you.

(Witness excused.)

Mr. Wright: Your Honor, may we take a short recess?

Trial Examiner Norwood: We will take 5 minutes' recess.

(A short recess was taken.)

Mr. Wright: I will call Mr. Zoller.

MILES M. ZOLLER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. State your name, please.

A. Miles M. Zoller.

Q. Mr. Zoller, will you state your official position?

A. I am manager of the Pigment Division of the Eagle-Picher Co. pany and also a director of the company.

Q. How long have you been in that position?

A. Since 1937.

Q. What was your employment with Eagle-Picher
1564 prior to that, if you were employed by them?

A. I started with Eagle-Picher in 1921; as salesman up until 1931; I was assistant sales manager of the Pigment Division, dry product sales, until 1935, and then sales manager of the pigment dry product sales until 1937.

Q. Since 1937 you had charge of production as well as sales in the dry pigment division?

A. That is correct.

Q. At what factories or plants does Eagle-Picher produce red lead?

A. At their Joplin, Missouri plant and Newark, New Jersey.

Q. How about litharge?

A. The same places.

Q. Basic sulphate of lead?

A. That is produced at their Galena, Kansas plant.

Q. How about orange mineral?

A. That is produced at Joplin and Newark.

Q. Does the Eagle-Picher Company produce a variety of grades of red lead?

A. It does, yes, sir.

Q. Will you state what those grades and qualities are?

A. It produces a series of red lead for use in the battery industry, bearing varying percentages of red lead content. It produces a series of red leads for the paint industry, also varying in red lead content. In the
1565 paint grinders they are classified 95, 97, and 98 percent.

Q. Do those same percentages apply to the battery grades?

A. No, they do not.

Q. In what percentages do you make them for the battery grades?

A. That varies from about 65 to 80 percent.

Q. Do you make a number of litharges?

A. We do, yes, sir.

Q. Will you state the different grades and types of litharges that are produced and sold?

A. Litharge is classified by the particle size, gram weight, premetallic lead content.

Q. Do you make a number of stock grades, let us say, that you generally offer for sale under a brand or trade name or description as to litharge?

A. Yes, we do. Do you want our trade classification for that?

Q. Yes, sir, if you please.

A. Mechanical oxides— Do you want our grade number? I do not exactly know what you are after, Mr. Wright.

Q. Do you have any name by which you sell them in the trade?

A. We have grade numbers.

Q. How many of those are there?

A. They approximate between 10 and 15.

1566 Q. Do you make a product called Zerox?

A. That is right, yes, sir.

Q. What is the composition of that product?

A. That contains mostly litharge. It has in it a small percentage of carbon black, black fix, and organic matter.

Mr. Wood: I would like to instruct the witness that if any of these questions call for secret information the witness should state that the information is secret. We have no desire to hold anything back.

Trial Examiner Norwood: Yes.

Mr. Wright: I will be glad to state I am not asking him for any technical definition of the exact percentages.

Trial Examiner Norwood: He can make the claim to me, that the information requested is a trade secret.

By Mr. Wright:

Q. Is the product Zerox substantially composed of litharge?

A. That is correct.

Q. Do you make a product called Perox?

A. That is correct, yes, sir.

Q. Of what generally is that composed?

A. Litharge and red lead.

Q. Litharge and red lead?

A. That is right.

Q. In, roughly, what percentages?

1567 A. The red lead content is usually around 25 percent.

Q. And the remainder is made up of what?

A. Litharge.

Q. Litharge. To what classes of customers are those two products marketed generally?

A. To the battery manufacturer.

Q. Is there any difference between litharge and sublime litharge?

A. Chemically, no, but physically, yes.

Q. What is that difference, briefly?

A. Sublime litharge is a much smaller particle size product than regular litharge.

Q. In other words, it is a further processing of red litharge?

A. No, it is made by a different process.

Q. Are all of these oxides made by roasting or calcining, or do you employ a variety of processes?

A. Sublime litharge is made by a sublimination process, atomization and sublimination direct. The other oxides are produced, as you classified, by roasting and oxidizing.

Q. Do you make a product called Plumbarge?

A. No, we do not.

Q. Now, do the products we have mentioned, Zerox, Perox, litharge, sublime litharge, and the red lead for the battery industry and red lead for the paint-grinding
1568 industry, do those comprise the bulk of your sales of the so-called oxides?

A. They do, yes, sir.

Q. In the production at Joplin and Galena, from what sources does the Eagle-Picher Company secure the pig lead?

A. The great percentage of it is secured on the open market.

Q. Do you also use in your production lead which is mined and refined by Eagle-Picher?

A. To some extent.

Mr. Wood: Over what period of time?

Mr. Wright: I will state that now most of these questions I am asking refer to the period, say, from 1933 to 1943.

The Witness: Yes.

Mr. Wright: If there is any time in there that your answer would not apply to the whole period, I wish you would state it and we will get it down to the proper time.

The Witness: Yes.

Mr. Wright: Read the question, please.

(The question was read by the reporter.)

By Mr. Wright:

Q. Well, now, over that period from 1933 to 1943, what percentage of the lead used in the Joplin plant roughly was pig lead produced by Eagle-Picher?

A. That has been a descending curve since 1933
1569 up to the present time. In other words, the percentage of pig lead used at the Joplin plant from 1933 to 1943 has been decreasing yearly.

Mr. Wood: The pig lead?

The Witness: Eagle-Picher's production.

By Mr. Wright:

Q. Eagle-Picher's production?

A. Yes.

Q. About what was it in 1933, at the start of that decrease, roughly, in percentage?

A. I do not have the figures. It would have to be an approximation.

Q. Would it be as much as a half?

A. Yes, sir, at least a half.

Q. Would it be two-thirds?

A. My guess would be it would be around two-thirds, that is correct.

Q. You say that graduafly descended, up to 1943?

A. That is right.

Q. About what would you say it would be in 1943?

A. Somewhere between 10 and 15 percent.

Q. Now, in purchasing pig lead on the open market for your Joplin plant, do you buy pig lead at the St. Louis market or at the Joplin market?

A. At the present time?

1570 Q. Yes, sir.

A. It is bought at the St. Louis market, plus the charge.

Q. What charge?

A. I think a dollar a ton.

Q. Is that charge for transportation?

A. That is the charge of the seller; that is what it is based on.

Q. That is the charge over St. Louis?

A. That is the charge from the seller, that is right.

Q. The price of St. Louis pig lead is customarily 15 cents a hundred under the New York price; is that correct?

A. Ordinarily, yes, sir.

Q. Is there a Chicago market on pig lead?

A. I think there is, yes. It is 5 cents over.

Q. It is 5 cents over the St. Louis pig lead price?

A. That is right.

Q. That would be 10 cents under the New York price?
A. Under the New York price.
Q. Now, in your Newark plant where is the pig lead obtained?
A. That is obtained 100 percent from producers of pig lead.
Q. Other producers than Eagle-Picher?
A. Other producers than Eagle-Picher, that is right.
Q. Is that bought on the New York market?
A. It is, yes, sir.

1571 Q. Mr. Zoller, I show you a number of documents which are marked for identification as Commission's Exhibits 838-A through I, which Mr. Wood produced yesterday, pursuant to subpoena.
A. Yes, sir.
Q. You recognize those documents?
A. I do.
Q. Will you state what they are, please? Start with this 838-A, -B, and -C.
A. They are price cards on the items listed thereon, white lead, lead oxide, and lead silicates.
Q. I call your attention to Exhibit 838-C. Down in the lower right-hand corner there is a small zero.
A. Yes, sir.
Q. What is the significance of that symbol?
A. That signifies that that is our prices in our par territory.
Q. Can you state what that par territory consists of, geographically?
A. All those states in the eastern part of the United States, east of the Mississippi, except Florida, Georgia, Alabama, and Mississippi, and those west of the Mississippi except Texas, Oklahoma and Arkansas.
Q. Let us get at it in a different way.

1572 Trial Examiner Norwood: Off the record just a minute.
(Discussion off the record.)
Trial Examiner Norwood: Go ahead.

By Mr. Wright:
Q. I call your attention to the symbol on Exhibit 838-B, in the lower-right-hand corner, there is 1. Will you tell me the significance of that symbol?
A. That is the price list on certain states in the Union,

whereby the prices of litharge and white lead and white silicate are a quarter of a cent higher than this territory. That territory consists of Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Oklahoma, and Arkansas.

Q. I show you Commission's Exhibit 758-F, which has been identified as the zones and price differentials of The Glidden Company, on oxides, lithards, and red lead, and the statement, "¼ cent per pound in Alabama, Arkansas, California, Florida, Louisiana, Georgia, Mississippi, Oklahoma, Texas, and West of the Cascades in Oregon and Washington."

Does that coincide with the geographical territory to which this one-quarter-cent differential in Exhibit 838-B applies?

A. Not precisely, no.

Q. Wherein does it differ?

A. This particular card is issued to the trade in the states that I have listed previously.

1573 Trial Examiner Norwood: Which card is that?

Mr. Wright: Exhibit 838-B. They are Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Oklahoma, and Arkansas.

By Mr. Wright:

Q. I call your attention now to Exhibit 838-A.

A. Yes, sir.

Q. And ask you to take the territories in which that applies.

A. That covers California and the western half of Oregon and Washington.

Q. That represents a differential, does it, above the price set forth in 838-B?

A. If does, yes, sir.

Q. Of a quarter of a cent?

A. A quarter of a cent on lead oxides and a quarter of a cent on the basic sulphate of lead.

Q. I see.

A. And also on lead silicate.

Q. Exhibit 838-B quotes the same price, then, on these products, as Exhibit 838-C?

A. On white leads only.

Q. On white leads only. As to the others, there is a quarter of a cent differential?

A. That is right.

Q. Now, I call your attention to documents marked 1574 838-D, -E, and -F. Will you state what those documents are?

A. These are documents that are comparable to these (indicating) with the exception you will note that they have zinc oxides listed along with the others. This is a different price basis than that (indicating). That is July 2nd and this is June 7th.

Q. That represents a different date. Now, the documents marked for identification as 838-H, -I, and -J.

A. They are on identically the same basis as 838-A.

Q. In other words, those differences in price are applicable to the same geographical territory?

A. That is right.

Q. And all of these documents, then, represent price quotations by the Eagle-Picher Company on these products?

A. That is correct.

Q. As of those dates?

A. Yes.

Q. Now, the quotations that you were referring to on these exhibits, 838, are those commonly known in the trade as card prices?

A. They are, yes, sir.

Q. Has the Eagle-Picher Company, over the period from 1930 to 1943, made and published similar quotations on cards?

A. Yes, sir.

Q. Which were known as card prices?

1575 A. Yes, sir.

Q. To what quantities of these lead pigments do the card prices apply?

A. You are referring to lead oxides, now?

Q. Yes, in particular.

A. On lead oxides, they apply to the five-ton quantities, and less than five ton quantities.

Q. Do those prices all refer to less-than-carload orders?

A. Yes.

Q. Any less-than-carload orders, then, would be quoted on the basis of the cards, is that correct?

A. Generally, yes, sir.

Mr. Wood: I did not understand that.

By Mr. Wright:

Q. In less-than-carload orders, they would be quoted on the card prices?

A. Generally, yes sir.

Q. Does the Eagle-Picher Company have in its possession a series of price cards on the oxides and on dry white lead from 1933 to 1943?

A. I cannot say for certain whether they do or not, Mr. Wright.

Mr. Wright: May we go off the record for just a minute?

Trial Examiner Norwood: Off the record.

1576 (Discussion off the record.)

By Mr. Wright:

Q. Mr. Zoller, would you undertake to ascertain whether or not those cards, or copies of them, rather, can be produced here?

Mr. Wood: I have offered to try to obtain the information which counsel wants. I will stipulate its correctness and forward it in due course.

Mr. Wright: Thank you very much, Mr. Wood.

By Mr. Wright:

Q. Mr. Zoller, it is my understanding of your testimony as regards the applicability of these cards to geographical territories, that in selling dry white lead, you quote on the basis of two zones, a par zone, which goes up to the Rocky Mountains, approximately, and a quarter of a cent higher zone, comprising the Pacific Coast States?

A. That would be true if we sold dry carbonate west of the Rockies, but it has been our policy not to sell west of the Rockies.

Q. Have you sold any in the past, in a considerable amount, in the period, say, from 1933 to 1943?

A. No.

Q. On the Pacific Coast?

A. There might have been occasional sales, but they are very insignificant.

1577 Q. Now, as to the oxides, on the card prices, there appear to be four zones, is that correct?

A. The cards that we have listed are three zones, the par zone, the Southern States zone, and the West Coast. Those are the only cards that we put out.

Q. Is there another zone that requires a higher differential than the West Coast zone?

A. We do not put out any price lists for the States of Montana, Wyoming, Colorado, and New Mexico.

Q. If you did business in those states, what differential, if any, over par, would be added?

A. You would add 50 cents.

Q. That would be a half a cent a pound in those states?

A. That is right.

Q. You do business in those states on occasion, do you not?

A. Very rarely.

Q. In doing business in Arizona, Idaho, Nevada, Utah, and east of the Cascades, in Oregon and Washington, on the oxides in less-than-carload quantities, what differential would be added to the par price?

A. 75 cents.

Q. And there is a quarter of a cent differential, then, added in Alabama, Arkansas, Florida, Louisiana, Georgia, Mississippi, Oklahoma, Texas, and also in California and in the western half of Oregon and Washington?

1578 A. That is right.

Q. That is correct, is it?

A. Yes, sir.

Q. Will you state over what period of time Eagle-Picher has quoted red lead and litharge oxides on the basis of those four zones, and the differentials that are quoted on them?

Mr. Wood: That question was not clear to me. It was my understanding of the witness' testimony that there was no uniformity, that the four zones were not applicable to all products. Am I wrong on that?

Mr. Wright: I asked the last question in regard to the oxides.

Mr. Wood: I thought you were including litharge.

Mr. Wright: Red lead I meant to include, yes, sir.

Mr. Wood: Let the witness answer.

Trial Examiner Norwood: Do you want the question read?

The Witness: No. I am afraid I cannot tell you accurately just how long that has been.

Trial Examiner Norwood: Read the question, Mr. Reporter.

(Question read by reporter.)

Trial Examiner Norwood: Now, you may make your answer.

The Witness: I would have to make a guess. I am 1579 not accurate on that.

By Mr. Wright:

Q. Well, what is your best recollection?

A. I would guess it has probably been for the last 10 years.

Q. I show you a document marked for identification as Commission's Exhibit 808-H, which has been identified as a page of the Oil, Paint, and Drug Reporter, page 33, for June 11, 1934, and I call your attention to the statement appearing thereon:

"Following the inauguration of the Lead Industries Code, corroders of white lead and lead oxides revised price schedules last week,".

and the following information:

Mr. Wood: Just a moment. I want to make an objection to the question on the ground that the cement case decided that activities during the NRA period were not competent evidence in relation to conspiracy.

Trial Examiner Norwood: Read the question.

Mr. Wright: Your Honor, there is no question pending. I am calling the witness' attention to an exhibit that is already in evidence in the case. My purpose is to refresh his recollection as to the time when the Eagle-Picher Company began using the four zones in the oxide business.

Mr. Wood: I apologize if I am premature with my objection.

1580 Trial Examiner Norwood: Counsel may make his objection if and when the question is asked. I would like to rule on it.

By Mr. Wright:

Q. I also call your attention to the statements under the subheading, "Red Lead" (indicating).

A. Yes.

Q. It follows over onto Exhibit 808-I, I believe it is. Mr. Zoller, does that document refresh your recollection as to about the time when the Eagle-Picher Company commenced quoting on the basis of those zones for lead oxides?

Mr. Wood: I think the witness can properly state whether or not his recollection is refreshed. I want my objection to apply on the next question.

Trial Examiner Norwood: Go ahead.

The Witness: It does, yes sir.

By Mr. Wright:

Q. What is your recollection of the date on which Eagle-Picher Company commenced quoting those four zones and differentials on the oxides?

A. I stated previously, 10 years, and that recollects the fact that it might have been a little bit longer than that.

Q. Is it correct, then, to say that it was right in that period, in the early part of June, 1934?

A. That is possible, yes, sir. It is also possible
1581 that some of those zones had been established previous to that time. I am not certain on that point.

Q. Do you recall the method of quoting on less-than-carload lots of red lead and litharge and the oxides prior to June, 1934, say, during 1932?

A. No, I do not.

Q. You do not recall the basis on which you made quotations?

A. I do not quite understand that, Mr. Wright.

Q. Yes. Did you employ a zone system in 1934?

Mr. Hinds: I object to the use of the word "system," if your Honor please. That is one of the issues, I believe, that this Commission is to decide. The Commission has been criticized recently, as your Honor knows, judicially, for using such words as "color" or "quoting," even specifically criticizing the use of the word "system," in a case of this sort. That is a fact. That is one of the ultimate issues to be decided by this Commission.

Trial Examiner Norwood: The word "matching" instead of "meeting" prices.

Mr. Hinds: That was another example.

Trial Examiner Norwood: Yes.

Mr. Hinds: The question here is whether there is a system. Glidden has specifically denied employing any system that may possibly be found against our contention.

Trial Examiner Norwood: Yes.

1582 Mr. Hinds: That is the issue to be tried here.

Trial Examiner Norwood: If we found it material to deny it, then certainly it may be the subject of evidence. Objection overruled.

Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, with regard to these exhibit, there was a mistake made in marking them, so that the

only side of the exhibit that was marked was the reverse side, which did not contain the price quotations. We have subsequently remarked the insides of the exhibits theretofore identified as 838-D, -E, -F, -G, -H, and -I, to give the inside sheet numbers D-1, E-1, F-1, G-1, H-1 and I-1.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Mr. Zoller, going back again to these price cards, which I called your attention to as D, E, F, G, H, and I, your testimony with regard to them by that number would also be applicable as to the subnumbers, D-1, E-1, and so forth, through I-1, would it not?

A. Let me see.

Mr. Wood: I think the question is indefinite, your Honor.

The Witness: Just the inside.

Mr. Wood: The question is: "Is your testimony 1583 applicable?" What part of his testimony?

Mr. Wright: I will amend the question, or I will withdraw it, rather.

Trial Examiner Norwood: He just wants to adopt a new number there in his answer.

Mr. Wood: That is clear. The documents are genuine, there is no possible objection to them. I just do not want them hooked up with completely indefinite testimony. I mean, I do not want the scope of the connection indefinite.

Mr. Wright: The only purpose in my asking the question was so that we would not later be met with an objection that we identified the outside of a document rather than the inside of it, so that the price quotations themselves, which are the only important part of the exhibit, would not be in evidence and not be identified.

Trial Examiner Norwood: Yes.

Mr. Wright: Am I correct in my understanding that you have no objection to taking the previous testimony with regard to these cards as applicable to the sub-numbers, E-1, F-1, and so forth?

Mr. Wood: In other words, your question goes only to genuineness, and I have no objection at all.

Mr. Wright: The question goes to more than that, because the witness identified these cards as applicable to certain geographical territory.

1584 Mr. Wood: Well, certainly he has explained them in his testimony, and that stands. If any more iden-

tification is required, I think you should go through them. I mean, the cards are Eagle-Picher cards which he testified are applicable, and were used as he has shown. That is all that is meant.

Mr. Wright: In view of that statement, Mr. Examiner, I do not think there is any more confusion in the record now about it. I now offer Exhibits 838-A, 838-B, 838-C, 838-D, 838-D-1, 838-D-2, 838-E, 838-E-1, 838-E-2, 838-F, 838-F-1, 838-F-2, 838-G, 838-G-1, 838-G-2, 838-H, 838-H-1 838-H-2, 838-I, 838-I-1, and 838-I-2.

Trial Examiner Norwood: Any objection? If not, they are received as marked.

(The documents referred to, heretofore marked for identification as Commission's Exhibits 838-A, 838-B, 838-C, 838-D, 838-D-1 838-D-2, 838-E, 838-E-1, 838-E-2, 838-F, 838-F-1, 838-F-2, 838-G, 838-G-1, 838-G-2, 838-H, 838-H-1, 838-H-2, 838-I, 838-I-1, and 838-I-2, were received in evidence.)

By Mr. Wright:

Q. Now, Mr. Zoller, I recall that I asked you if you knew what method of quoting has been employed by Eagle-Picher on the oxide in less-than-carload quantities in 1932.

What geographical considerations entered into it?

1585 A. I cannot answer the question. I do not recall; I do not remember.

Q. Were zones employed?

A. I am not sure of that. I know that there were higher prices in certain localities, but as far as zones are concerned, I cannot answer with authority at all.

Q. Now, with regard to the dry white lead in less-than-carload quantities, over how long a period of time has Eagle quoted on the basis of those zones?

A. As I explained before, there is no zone price on dry white lead except on the Pacific Coast, and it has not been our policy to sell on the Pacific Coast.

Q. So in all the territory in which you sold in less-than-carload lots of dry white lead, it is a flat delivery price irrespective of the location of the customer?

A. That is right, on dry carbonate.

Q. Yes. Whether it be in Maine or Florida, or in Cincinnati?

A. That is right.

Q. Can you state over what period of time there has

been that flat price in all the territory quoted by Eagle-Picher for dry white?

A. No, I cannot. You mean, how far back?

Q. Yes, sir. What is your latest recollection of it?

A. I cannot recall when it was otherwise, but that does not make it certain.

1586 Q. In other words, you do not recall that there were ever any places east of the Rockies that took higher delivered prices on dry white than the lowest delivered prices?

A. I do not recall at this minute, no sir.

Q. There could have been, though, but you just do not recall?

A. That is a possibility.

Q. I call your attention to Commission's Exhibit 754-Z-54, which has been identified as a tabulation of invoices on dry white lead by Eagle-Picher during the period from January 1, 1933, to March 31, 1934. The first transaction there, invoice to the Armstrong Company of Detroit, Michigan, which has a note, "Price basis $3.00 New York, plus card difference." Does that refresh your memory as to the basis of quoting?

A. Was that 1934 or 1933?

Q. 1933. I believe that was on January 10, 1933. Then on September 21, 1933, to the same customer, an order was quoted apparently at $4.50 plus card difference, I assume.

A. That does not jell with me.

Mr. Wood: I would like to object to that line of questioning. I think that the witness is being confronted with a document that he has never seen before. I think you should bring out whether or not he knows anything about any of those invoices. I do not think they came from his department.

1587 Mr. Wright: I do not know whether he knows anything about these particular invoices, but he has already testified that he has been connected with the dry products division of Eagle-Picher over a great many years, and these obviously refer on their face to 600-pound barrel containers, so I assume they would come within his knowledge.

I am not picking isolated invoices, I am showing him that this kind of price basis of some arbitrary figure plus card differences appears on practically all the invoices listed on this exhibit.

Mr. Wood: You said you assume he knows. I think he should be told what they are and asked what he knows. Maybe the answer is "yes", and maybe it is "no". I do not care which way it is, except that the witness, as a matter of fair chance, should be told what he is shown and asked about.

Mr. Wright: Whether or not it is from his department.

Trial Examiner Norwood: I think counsel is right.

By Mr. Wright:

Q. Were you, in the period 1933 and 1934, connected with the sales of dry white lead in other than keg quantities?

A. That was handled by the white lead division in those days. That was before the present organizational setup. Whereas we had to do with the solicitation of business, I do not think we had anything to do with the billing at that time.

1588 Q. Then you have no idea as to the significance of those statements? For instance, I call your attention to the statement on Exhibit 754-Z-57, note 1, which refers to an invoice to the Chicago Pottery Company, Chicago, Illinois. On January 10, 1933, it says, "Price basis $2.875 (St. Louis open) plus card difference."

Mr. Wood: I object to that type of questioning. This document is in Mr. Kelaher's handwriting. I do not know whether that is an argumentative notation of Mr. Kelaher or whether it is something literally quoted from an invoice, or what it is.

Mr. Wright: The testimony was that it was copied literally from the records of the Eagle-Picher Company.

Mr. Wood: In what form? In general Mr. Kelaher testified that most of his information was taken from the records of the Eagle-Picher Company, that he got certain additional information from the Traffic Department, and that he put this together as an argumentative exhibit.

Here is a man that did not hear Mr. Kelaher testify. He is being shown a document and asked questions about it without having it explained to him as to what it is.

Trial Examiner Norwood: It is not claimed to be a document that is used to refresh his memory?

Mr. Wright: No, sir. I do not make any contention that he has ever seen this document.

1589 Trial Examiner Norwood: You are using that to illustrate your question?

Mr. Wright: Your Honor, he has already qualified as having been with the Eagle-Picher Company since, I believe it was, 1920, and has had considerable responsibility in the handling of these pigments. Now, there are notations on the tabulation, which has already been identified as having been made up from the invoice records of the Eagle-Picher Company, and that these notes, which appeared on those invoices—

Mr. Wood: You say, "apparently appeared on the invoices"?

Mr. Wright: Well, that can easily be obtained. I see Mr. Kellaher in the room. I am perfectly willing to recall him to the stand and establish it.

Trial Examiner Norwood: You may refer to all those entries there and ask him if they mean anything to him, if he knows what they mean, and if he does, what do they mean. I think you can do that either by reference to the paper or without it.

By Mr. Wright:

Q. I believe you have already testified Mr. Zoller, that those references do not mean anything to you, is that correct?

A. I do not understand them, no sir.

Q. You also do not recall the basis of quotation in that period?

1590 A. No, sir, I do not.

Q. Mr. Zoller, how did the Eagle-Picher Company quote on dry white lead, say, during 1943, in carload quantities?

A. You mean the price?

Q. Yes sir. Was that on the same basis as the card prices?

A. Yes, sir.

Q. In other words, I believe you stated that there was a five-point break.

A. No, not on dry carbonate of lead.

Q. What kind of discounts were offered on dry carbonate?

A. A quarter of a cent a pound on dry carbonate.

Q. That is not customarily offered at a differential above the price of pig lead?

A. No sir, it is not.

Q. It is sold on a card basis irrespective of quantity?

A. That is right.

Q. As to red leads and oxides in quantities of a carload and over, how are they customarily sold, say, to the battery industry?

A. Customarily sold at $150 over the price of New York pig lead.

Q. That is the litharge that is at the $1.50 over the price of New York pig lead?

A. That is right.

Q. Would that include Zerox?

1591 A. Yes.

Q. That is $1.50 over?

A. Yes.

Q. How about Perox?

A. That is $1.75.

Q. In other words, it is a quarter of a cent higher on the Perox than the Zerox and litharge?

A. That is correct.

Q. How about sub-fine litharge?

A. That is the same, $1.50.

Q. How about red lead?

A. That is $2.50.

Q. Does that include all grades, or is that just the 95 percent limit?

A. That includes all grades up to 95 percent.

Q. How about the 97 percent?

A. 97 percent is $2.75, and 98 percent, $3.00.

Q. Above the New York prices?

A. That is right.

Q. Now, on those carload quantities, are zones employed? Is there any portion of the country where customers pay a higher price than in other portions of the country?

A. In Zone 2, that is Florida, Georgia, Mississippi, Alabama, and so forth, 25 cents on carload quantities, except in Oklahoma and Arkansas.

1592 Q. When did that exception of Oklahoma and Arkansas first appear in your quotations?

A. I cannot recall the exact date. It seems to me it was about four or five years ago.

Q. Was it some time during 1941?

A. I cannot answer that. I am not sure myself.

Q. How about carload quantities of the oxides on the Pacific Coast? Are they also at a differential above?

A. No.

Q. They are at par?

A. Yes.

Q. So zone 2 just covers the Southern States that you have listed?

A. That is correct.

Q. Can you recall over what period of time that zoning as to the carloads has been applicable to those products as quoted by Eagle-Picher?

A. Approximately the same period of time that they have been on the less-than-carload lots.

Q. Now, going back to the exception as to Oklahoma and Arkansas, will you say it is fairly certain that that was made after 1940? You said four or five years ago.

A. Yes. I am fairly certain that is the case.

Q. Was it made prior to the imposition of ceilings by the Office of Price Administration?

1593 A. Yes, it was. That dates it back.

Q. Before January, 1942?

A. Yes.

Q. So it would be somewhere, probably, between 1941 and 1942?

A. Yes.

Q. Mr. Zoller, I show you a group of documents marked for identification as Commission's Exhibits 840-A to 840-Z-262. Do you recognize these documents?

A. They certainly appear to be duplicate copies of invoices of Eagle-Picher Company.

Mr. Wright: They were produced by Mr. Wood yesterday in response to the subpoena of the Commission. Is that correct, Mr. Wood?

Mr. Wood: If that is the same pile of documents that I handed you yesterday, that is the case. I do not think that it is going to be very profitable to try to have the witness identify the whole group by looking at the one on top.

Mr. Wright: May I ask, then, if you are willing to stipulate that these are genuine and authentic invoice records of the Eagle-Picher Company?

Mr. Wood: Surely.

Mr. Wright: All right, sir.

Trial Examiner Norwood: Very well.

1594 Mr. Wright: Your Honor, I now offer in evidence Commission's Exhibits 840-A to 840-Z-262 as invoices showing the transactions and prices and terms of sale employed by the Eagle-Picher Company in the period September through December, 1941.

Trial Examiner Norwood: Any objection? If not, they may be received as marked.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 840-A, 840-B, 840-C, 840-D, 840-E, 840-F, 840-G, 840-H, 840-I, 840-J, 840-K, 840-L, 840-M, 840-N, 840-O, 840-P, 840-Q, 840-R, 840-S, 840-T, 840-U, 840-V, 840-W, 840-X, 840-Y, 840-Z, 840-Z-1, 840-Z-2, 840-Z-3, 840-Z-4, 840-Z-5, 840-Z-6, 840-Z-7, 840-Z-8, 840-Z-9, 840-Z-10, 840-Z-11, 840-Z-12, 840-Z-13, 840-Z-14, 840-Z-15, 840-Z-16, 840-Z-17, 840-Z-18, 840-Z-19, 840-Z-20, 840-Z-21, 840-Z-22, 840-Z-23, 840-Z-24, 840-Z-25, 840-Z-26, 840-Z-27, 840-Z-28, 840-Z-29, 840-Z-30, 840-Z-31, 840-Z-32, 840-Z-33, 840-Z-34, 840-Z-35, 840-Z-36, 840-Z-37, 840-Z-38, 840-Z-39, 840-Z-40, 840-Z-41, 840-Z-42, 840-Z-43, 840-Z-44, 840-Z-45, 840-Z-46, 840-Z-47, 840-Z-48, 840-Z-49, 840-Z-50, 840-Z-51; 840-Z-52, 840-Z-53, 840-Z-54, 840-Z-55, 840-Z-56, 840-Z-57, 840-Z-58, 840-Z-59, 840-Z-60, 840-Z-61, 840-Z-62, 840-Z-63, 840-Z-64, 840-Z-65, 840-Z-66, 840-Z-67, 840-
1595 Z-68, 840-Z-69, 840-Z-70, 840-Z-71, 840-Z-72, 840-Z-73, 840-Z-74, 840-Z-75, 840-Z-76, 840-Z-77, 840-Z-78, 840-Z-79, 840-Z-80, 840-Z-81, 840-Z-82, 840-Z-83, 840-Z-84, 840-Z-85, 840-Z-86, 840-Z-87, 840-Z-88, 840-Z-89, 840-Z-90, 840-Z-91, 840-Z-92, 840-Z-93, 840-Z-94, 840-Z-95, 840-Z-96, 840-Z-97, 840-Z-98, 840-Z-99, 840-Z-100, 840-Z-101, 840-Z-102, 840-Z-103, 840-Z-104, 840-Z-105, 840-Z-106, 840-Z-107, 840-Z-108, 840-Z-109, 840-Z-110, 840-Z-111, 840-Z-112, 840-Z-113, 840-Z-114, 840-Z-115, 840-Z-116, 840-Z-117, 840-Z-118, 840-Z-119, 840-Z-120, 840-Z-121, 840-Z-122, 840-Z-123, 840-Z-124, 840-Z-125, 840-Z-126, 840-Z-127, 840-Z-128, 840-Z-129, 840-Z-130, 840-Z-153, 840-Z-154, 840-Z-155, 840-Z-156, 840-Z-157, 840-Z-136, 840-Z-137, 840-Z-138, 840-Z-139, 840-Z-140, 840-Z-141, 840-Z-142, 840-Z-143, 840-Z-144, 840-Z-145, 840-Z-146, 840-Z-147, 840-Z-148, 840-Z-149, 840-Z-150, 840-Z-151, 840-Z-152, 840-Z-153, 840-Z-154, 840-Z-155, 840-Z-156, 840-Z-157, 840-Z-158, 840-Z-159, 840-Z-160, 840-Z-161, 840-Z-162, 840-Z-163 840-Z-164, 840-Z-165, 840-Z-166, 840-Z-167, 840-Z-168, 840-Z-169, 840-Z-170, 840-Z-171, 840-Z-172, 840-Z-173, 840-Z-174, 840-Z-175, 840-Z-176, 840-Z-177, 840-Z-178, 840-Z-179, 840-Z-180, 840-Z-181, 840-Z-182, 840-Z-183, 840-Z-184, 840-Z-185, 840-Z-186, 840-Z-187, 840-Z-188, 840-Z-189, 840-Z-190,
1596 840-Z-191, 840-Z-192, 840-Z-193, 840-Z-194, 840-Z-195, 840-Z-196, 840-Z-197, 840-Z-198, 840-Z-199, 840-Z-200, 840-Z-201, 840-Z-202, 840-Z-203, 840-Z-204, 840-Z-205, 840-Z-206, 840-Z-207, 840-Z-208, 840-Z-209, 840-Z-210, 840-Z-211,

840-Z-212, 840-Z-213, 840-Z-214, 840-Z-215, 840-Z-216, 840-Z-217, 840-Z-218, 840-Z-219, 840-Z-220, 840-Z-221, 840-Z-222, 840-Z-223, 840-Z-224, 840-Z-225, 840-Z-226, 840-Z-227, 840-Z-228, 840-Z-229, 840-Z-230, 840-Z-231, 840-Z-232, 840-Z-233, 840-Z-234, 840-Z-235, 840-Z-236, 840-Z-237, 840-Z-238, 840-Z-239, 840-Z-240, 840-Z-241, 840-Z-242, 840-Z-243, 840-Z-244, 840-Z-245, 840-Z-246, 840-Z-247, 840-Z-248, 840-Z-249, 840-Z-250, 840-Z-251, 840-Z-252, 840-Z-253, 840-Z-254, 840-Z-255, 840-Z-256, 840-Z-257, 840-Z-258, 840-Z-259, 840-Z-260, 840-Z-261, 840-Z-262, were received in evidence.)

By Mr. Wright:

Q. Mr. Zoller, I call your attention to the information appearing along the bottom of the page, the various columns, "Checked by," "Industry," "Salesman," "Shipt. Point," and "Doc." What does that mean?

A. "Document," I guess. I do not know.

Q. And "Prod."?

A. "Product."

Q. And "Prod. Plt."?

A. That is "Product plant."

1597 Q. And then in the column headed "Market," there is one item, 5.75, and another item 5.85, on this Exhibit 840-A. Do you recall that?

A. In my judgment, that is the pigment price in effect at that time.

Q. I believe it was testified yesterday by a representative of the Bureau of Mines that their statistics indicated that pig lead, during September of 1941, was quoted at $5.85 a hundred, New York. What is the significance of the 5.75? Would that be the Chicago price of pig lead?

A. That would be the Joplin price.

Q. 5.75 is the Joplin price?

A. New York, 5.85, yes, sir.

Q. Is the Joplin price higher than the St. Louis price?

A. Yes.

Q. By a dollar a ton, I believe you said?

A. Yes, sir.

Q. In this column, "Diff." what is the significance of that term?

A. That is the differential on carload sales of pig lead, or the card price.

Q. Where it appears as "C", that would mean card price?

A. That is right.

Q. That would apply also to Exhibit 840-C?

A. That is right.

1598 Q. That is the card price?

A. Yes.

Q. In other words, you apparently enter on each of these invoices whether or not it is an order requiring a price made up of a differential over the pig lead price, the prevailing pig lead price, either at Joplin or New York?

A. That is for our own records, that is right.

Q. Would it be fair to state, then, that the pig lead price is a very important consideration in your quoting of these products?

A. Yes, sir.

Q. On Exhibit 840-R, we find in that column headed "Diff."— by the way what does that mean? Differential?

A. Yes.

Q. The figures $1.50.

A. That is right.

Q. And under "Market," $5.85. That would be the New York pig lead price?

A. That would be the New York pig lead price, that is right.

Q. $1.50 a hundred differential?

A. That is right.

Q. In other words, even though you are dealing in the Chicago market, with the customer there, you get a differential on the basis of the New York market?

A. That is correct.

1599 Q. When you buy on the Joplin market?

A. That is correct.

Q. Mr. Zoller, to what industries do you sell the greater part of your oxide production?

A. The storage battery industry, the paint industry, ceramics, oil refining.

Q. Is your listing in approximately the order of importance as to customers?

A. The storage battery is the most important, and ceramics is probably the second.

Q. Are you familiar with the battery industry generally?

A. In general, yes, sir.

Q. You have been selling to them, I take it, for a good many years?

A. Quite a few.

Q. Is there a considerable number of battery manufacturers in the United States?

A. There are quite a few. I do not know what you mean by "considerable".

Q. Are there more than 100?

A. I would say there are, yes, sir.

Q. Are there more than 200?

A. No, my guess would be some place between 100 and 200.

Q. Are they located in widely scattered places?

A. Yes, sir.

1600 Q. Do all the battery manufacturers with whom you do business buy on the carload basis, or do you have a considerable business in the battery industry on a less-than-carload basis?

A. We have business on both the carload and less-than-carload basis.

Q. Are there many battery manufacturers, to your knowledge, who are of a size that would not permit their purchasing these oxides on a carload basis?

A. Numerically, I would estimate that there are more in that classification than the carloads.

Q. Is that correct?

A. Yes.

Q. Are they located at widely scattered places in the United States?

A. In my opinion, yes, sir.

Q. In almost every locality in the United States?

A. That is right.

Q. Do you have customers in the battery industry throughout the entire United States?

A. They are fairly widely distributed, yes, sir.

Q. Do you know to what use they put these lead oxides in the battery industry?

A. Well, lead oxides are the active material of the battery.

1601 Q. Do they form the plates of the battery?

A. That is right.

Q. Do you know about how many pounds of lead oxides would go into a standard automobile battery?

A. That varies somewhat between 10 and 12 pounds.

Q. Are there also automotive batteries with as much as 20 pounds of lead oxide in them?

A. I am not sure what the larger size batteries weigh.

Q. Do you know what the gross weight of a battery containing 12 to 16 pounds of lead oxides would be?

A. Somewhere between 40 and 50 pounds.

Mr. Wood: You mean dry weight?

Mr. Wright: Dry weight, yes, sir.

The Witness: That is the over-all weight of the battery ready to use in an automobile?

By Mr. Wright:

Q. No. The dry weight without the electrolytic element.

A. I cannot answer that. I think it is around 40 pounds.

Q. Well, ready to use in an automobile, what would you estimate?

A. How is that?

Q. Ready to use in an automobile, what would you estimate the weight of that battery?

A. Between 40 and 50 pounds.

Q. So the lead oxides would represent approxi-
1602 mately one third of the weight of the finished bat-
tery, is that correct?

Mr. DuBose: He said 10 or 12 pounds.

The Witness: 10 or 12 pounds as against 40 or 50, somewhere around 20 or 25 percent.

By Mr. Wright:

Q. Over the period from 1933 to 1943 was the battery business a highly competitive business, to your knowledge?

A. Yes, sir.

Q. Were the prices quoted on automotive batteries widely varying, do you recall, or were they pretty well standardized?

A. I cannot answer with authority. I would say that they varied.

Q. Now, in your carload transactions, are those customarily by contract?

A. No.

Q. Those are spot quotations?

A. Yes, sir.

Q. So that on a spot quotation what pig lead price would be taken? As of what time?

A. At the present time the pig lead is as of the date of shipment.

Q. How about in the period from, say, 1934 to 1943?

A. Customarily, at that time the closing price of pig lead as of the date the order was accepted.

Q. When was the practice changed on that if you recall?

1603 A. Within the last two years—two or three years.

Q. Have you also had contracts covering the requirements of oxide purchases over a period of time?

A. Yes.

Q. What is the usual duration of those contracts? Is there any customary practices with regard to their duration?

I am speaking now of the period prior to 1943.

A. No specific time. They are six months to a year.

Q. Six months to a year. How do those contracts establish the pig lead price from which the differential is to be taken? Was there any customary practice about that?

A. That was at the buyer's option, to specify the pig lead as to the date he placed his order and it was accepted, or the average monthly price of pig lead in the month in which it was shipped.

Q. It could have been either way?

A. It could have been either way.

1604 Q. Mr. Zoller, I show you herewith Commission's Exhibit 809, which has been identified as a copy of the Code of Fair Competition for the Lead Industry, as approved on May 24, 1934. Do you recall the provisions of Schedule A as shown in that Code?

Mr. Wood: I object to any question in regard to the lead code on the ground, as previously stated, that it is now the law that the NRA proceedings cannot be used as evidence of conspiracy.

Trial Examiner Norwood: Objection overruled.

The Witness: I recall this, yes, sir. I do not recall all that is in it.

By Mr. Wright:

Q. Do you recall the provisions of the schedule of conditions of sale for lead oxide in lots of less than 20 tons?

A. Yes.

Q. I assume when the code was in force the Eagle-Picher Company abided by the terms and provisions of the code, is that correct?

Mr. Wood: My objection goes to this whole line of questioning. I do not want to be interrupting all the time.

Trial Examiner Norwood: That is right.

The Witness: Yes, sir.

By Mr. Wright:

Q. What changes did the provisions of Article I 1605 of Schedule A of the Code require in the business of the Eagle-Picher Company in these products, do you recall?

A. When it was put into effect?

Q. Yes, sir.

A. I do not recall. That is 12 years ago.

Q. Yes. Could you glance at that briefly and see if your memory is refreshed about it?

A. I frankly cannot give an answer as to what changes this entailed in the practices in effect previous to the time this went into effect, but I am sure there were some.

Q. There were some changes?

A. Yes.

Q. You do not recall specifically what they were?

A. I do not recall what they were.

Q. Now, the terms and conditions that are set forth in this Article I of Schedule A, were they used for any considerable length of time by the Eagle-Picher Company, or over what time were they used?

A. I would say they were used during the time that NRA was in effect.

Q. At the time NRA was invalidated, did the Eagle-Picher Company continue to use the terms and conditions as set forth there, or were some changes made?

A. I haven't read this and refreshed my memory entirely on it.

1606 Q. Go ahead.

A. I think there are probably some things that were kept in practice and some left out.

Mr. Wright: Off the record, if your Honor please.

(Discussion off the record.)

Trial Examiner Norwood: Let us take a 5 minutes' recess.

(A short recess was taken.)

Trial Examiner Norwood: You may proceed.

Mr. Wood: I would like, your Honor, to renew and repeat my objection to the line of questioning which goes to a comparison of the practices under the NRA Code and present practices. I concede, of course, that counsel may interrogate in respect to present practices, and then in his brief or his argument make whatever contrasts or compari-

sons he sees fit, but in w of the Cement Decision and the place where that put the NRA Code practice I submit it is an improper line of examination at this time.

Mr. Wright: Your Honor, I submit that there are several decisions relating to that point at variance to the court's statement in the Cement Case. Under the circumstances, it seems to me that the testimony should be admitted.

Trial Examiner Norwood: I think so. We have received this evidence heretofore in this case.

1607 Mr. Wright: That is correct.

Trial Examiner Norwood: I think we better keep the practice in this one case uniform and then you can stand or fall by the result, whichever it may be. We have heretofore, in all the cases, received the NRA Code in evidence, and have received evidence of what was done under the NRA Code in order to throw light upon what was previously or subsequently done, where there was any connection with it. I have yet to see a case where a respondent had been proceed against for practices under the Code, performed during the Code period, provided it had not continued thereafter. I feel pretty sure that that is the policy of the Commission. I have admitted this testimony for the purpose of showing what was done before or after, and if there is no evidence to show that they were done before or after the Code period the matter will be struck or disregarded from the testimony.

Mr. Wright: I just wanted to say that that was my sole purpose in this line of questioning.

Trial Examiner Norwood: Yes. Counsel's objection is overruled, with that explanation. You may have your objection to any further testimony along this line. Go ahead.

By Mr. Wright:

Q. With regard to Schedule A, Article I, relating to lead oxides in lots of less than 20 tons, that would be
1608 in less than carload quantity, would it not?

Mr. DuBose: Has this been identified as an exhibit and given an exhibit number?

Mr. Wright: Commission's Exhibit 109. The bound volume is one exhibit number. This is page 378 of the exhibit.

By Mr. Wright:

Q. In the heading under "Price" subheading "A-1" appears "not more than ½-cent per pound for minimum

shipment of 5 tons for one buyer at one time to one destination."

Did your quoted terms of sales of oxides in those quantities carry that differential after the NRA Code was ineffective?

A. In general, yes, sir.

Q. Was that ½-cent per pound for quanti[illegible]iscount for 5-ton shipments carried through from the Code period up through 1943?

A. In general, yes, sir.

Q. Now, with regard to the subparagraph (b) of Paragraph 4 of Article I, has the Eagle-Picher Company made it a practice, in the period from the NRA Code, say, through 1943 to grant the 5-ton price on partial shipments of an order as set forth in that paragraph (b)?

Mr. Wood: Objection, your Honor. It should be understood, I think, that the testimony is limited, and that
1609 showings of differences in price before 1936 have nothing to do with this case. In other words, that was the passage of the Robinson-Patman Act in 1936. The mere fact there was a difference in quantity discounts in 1933 is not properly admissible in evidence.

Trial Examiner Norwood: We are not under the particular Robinson-Patman count, I should not say.

Mr. Wood: I thought the question he was putting was on Count 2.

Mr. Wright: The question related to the period from the time of the elimination of the NRA Code to 1943, which would cover all that time, including the period from 1936 to 1943.

Trial Examiner Norwood: Yes. I will overrule the objection.

The Witness: That was the practice in general, yes.

By Mr. Wright:

Q. I see. How about the provisions of paragraph (c) which provided that they should be no protection against a decline in seller's price? Was that quoted by Eagle-Picher in the period from the end of NRA to 1943?

A. That was not quoted.

Q. Was that a general policy of the company?

A. It was a general practice of the company, yes.

Q. I see. I call your attention to subparagraph
1610 (d), "Red lead containing 97 percent or 98 percent of Pb_3O_4 shall be so marked on the package and shall

be sold at not less than ¼-cent and ½-cent per pound respectively over seller's price for grades of lower Pb_3O_4 content."

Were those differentials employed generally from the end of NRA to 1943?

A. They were in general, except where it became necessary to deviate because of competitive conditions.

Q. I notice that this schedule applies to the less-than-carload lots. As I recall your testimony you published card prices for those quantities.

A. That is right.

Q. Did the published cards over that period ever have a different differential for those grades than appears in this?

A. Not to my recollection, no.

Q. In other words, you may have deviated from that in particular transactions but your published quotations did not?

A. That is correct, yes.

Q. Thank you. Now, under paragraph 5 of Article I, "delivery f.o.b. car seller shipping plant or point or by truck f.o.b. buyer's premises." As I understand, your prices have been delivered prices on that basis over the whole period.

A. Yes, sir.

Q. So that would also apply to paragraph 6 re-
1611 garding transportation allowance in the period subsequent to this Code?

A. In general, yes, sir.

Q. Now, I call your attention to the provisions of paragraphs 7, 8 and 9 of Article I regarding requirements for shipping within 30 days and the cash discount and net dates, and imposition of taxes on the transaction. Have the quotations and policies of the Eagle-Picher Company embodied those provisions in the period since the NRA to 1943?

A. On shipments there has been no stipulation that the order should be delivered in 30 days. It may be delivered in one day or two days or 60 days, depending upon the ability of ourselves to make shipment.

Q. You are speaking now of the present time?

A. Yes sir.

Q. How about the period say in 1941?

A. That also applied in 1941.

Q. Do you recall when that change in policy was made after NRA?

A. Not precisely, no, I do not.

Q. Now, how about the terms of sale and discounts and taxes?

A. The terms of sale have been followed. That did not appear in any of our sales schedules, the matter of taxes.

Q. Did the policy of the company follow the provisions of that paragraph 9?

A. In general, yes.

1612 Q. In handling the sales of lead oxides?

A. In general, yes.

Q. In other words, then, the only difference in the practice from the end of NRA to 1943 would be in connection with subparagraph 7 regarding the shipping date?

Mr. DuBose: You are speaking generally?

Mr. Wright: Yes.

The Witness: That is right, in general.

Mr. Wright: At least that is the policy of the company.

By Mr. Wright:

Q. I understand there may have been deviations at times.

A. Yes. In general, that has been the policy.

Q. Now, with regard to Article II, "Conditions for sale of lead oxides in lots of at least 20 tons", and under (b)(2), "Quantity", it states, "Provided that each order or release shall be in an amount not less than 20 tons for destination for the account of not more than one buyer." Has that been your policy with reference to the 20-ton lot orders in general since NRA?

A. Our general policy, yes, sir.

Q. I believe you have already testified that it was your policy as to paragraph 5 of Article II to add to a differential to the price of common lead, New York, to arrive at a large quotation.

1613 A. That is right.

Q. In carload orders?

A. Yes.

Q. Now, I call your attention to the three alternative provisions under 5.

A. Yes, sir.

Q. "Either the American Smelting and Refining Company's quotation at the close of the market day the order is received or the A. S. & R. quotation at the close of market

on a definitely agreed future date, or the average market as reported in American Metal Market and Engineering and Mining Journal."

Has the Eagle-Picher Company, in the period since NRA, generally followed those three alternatives in quoting on carload quantities of oxides?

A. In general, yes, sir.

Mr. Wood: I object to the form of the question.

He is asking the witness whether the company has followed alternatives.

Mr. Wright: I will rephrase the question—and withdraw it.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Has the Eagle-Picher Company offered purchasers, in the period from the end of NRA through 1943,
1614 alternative forms of contract embodying these three provisions that appear in section 5?

A. Not in all cases, no.

Q. In other words, to some buyers just one basis is offered?

A. That is right.

Q. And to other buyers another basis?

A. That is correct.

Q. But you have solicited business on one or all of these three bases?

A. Yes, sir.

Q. Since that period?

A. Yes, sir.

Q. Now, with reference to subparagraph (b), "Emergency Shipments of Less Than 20-Ton Quantity to a Customer Who Has on Hand an Order for More Than 20 Tons", has that provision been a policy of Eagle-Picher Company in the period since NRA?

A. It has in general, yes, sir.

Q. How about subparagraph (c), that no protection against decline in seller's price may be given, has it been the policy of Eagle-Picher to give protection against decline in price in these transactions since NRA?

A. No.

Q. I call your attention to subparagraph (d) providing for the one-quarter and one-half cent differentials
1615 for 97 and 98 percent red lead content, which is similiar to the provision in Article I. Have those dif-

ferentials been quoted by Eagle-Picher for those different grades in that period since NRA?

A. They have been quoted and they have been deviated from.

Q. Has it been the general policy of the company to quote on that basis?

A. Yes.

Q. Now, will you explain the practice since NRA with reference to the shipping allowances in 7(a) and (b)? Has that been followed by the Eagle-Picher Company?

A. (a) has been followed in general and (b) I would say has not been followed.

Q. Do you customarily sell to buyers who operate their own steamships?

A. We do on occasion, yes, sir.

Q. You do on occasion?

A. Yes, sir.

Q. What has been your practice in the period, say, from 1936 to 1943, with regard to allowances of transportation to such customers?

A. We have not made allowances. In general, we have not made allowances to customers transporting materials in their own boats.

Q. Now, with reference to the alternatives appear-
1616 ing in paragraph (a), "shipment shall be made at least within 60 days from (a) the date on which the price of pig lead governs the sale, or (b) beginning of the period during which the average price of pig lead governs the sale," has the practice of the Eagle-Picher conformed to those provisions in the period from 1936 to 1943?

A. Insofar as it has been practical, yes.

Q. Well, during that period was it very often impractical to do so?

A. Occasionally.

Q. Just occasionally?

A. Yes.

Q. With reference to provisions 9 and 10 on terms and taxes, have the practices of Eagle-Picher been in conformance with them from the end of NRA to 1943?

A. Yes.

Q. Now, are you familiar with the provisions that are in Article III regarding dry white, basic carbonate of lead?

A. I have read them, yes, sir.

Q. Have the practices of the Eagle-Picher Company

been in conformance with these provisions in the period from 1936 to 1943?

A. Not in entirety, no.

Q. Can you point out where they have varied?

A. Under "Contract Sales" (b), item 1 and item 2.

1617 Q. Now, what was the practice, say, in 1941?

A. The practice in 1941 was in general in line with these items.

Q. It was in line with these items?

A. In 1941.

Q. Were the contract sales provisions?

A. Yes.

Q. Had they extended from the period of NRA through to 1941?

A. In general, yes, sir.

Q. When was the change made in those contract provisions?

A. About two years ago.

Q. Was there any other item or are there any other items on there in which changes have occurred since NRA?

A. No, in general we have followed the policies outlined.

Q. Mr. Zoller, I believe I asked you before the recess if you could recall what changes those provisions of the NRA Code required in the manner in which you were doing business prior to the Code.

A. I said I could not answer that.

Q. You could not answer that. But you recall there were some changes?

A. My memory indicates that there were some. Whether they were minor or major, I could not say.

Q. They could have been either?

A. Right.

1618 Q. Do you not recall the circumstances or the time?

A. No, I do not.

Q. Has Eagle-Picher sold dry white on the basis of printed form contracts which embodied the provisions substantially of Article III of that Code, that is, up to the time you made the change in 1941, two years ago, I think you said?

A. They have sold on printed form contracts, yes, sir. I do not recall whether the forms embody all of the features in the Code or not.

Q. Mr. Zoller, you mentioned it has been the policy of Eagle-Picher to quote on litharge and Zerox on the basis of $1.50 per 100 pounds over the New York quotation on pig lead.

A. Yes.

Q. Over how long a period of time has that differential been the going price?

A. I cannot recall precisely.

Q. Has it been over a considerable period of time? Has it been several years?

A. It has been 15 years probably.

Q. In other words, on that quoted price the only thing that affects the price is the movement of the price on pig lead?

A. That is right.

Q. In what units does the price of pig lead customarily move? Is it in hundredths of a cent?

A. I would say the smallest unit would be 5 cents a hundredweight.

1619 Q. When the price of pig lead goes up 5 cents a hundredweight, the price quoted then on the differential product in carloads automatically moves up or down 5 cents, as the case may be?

A. That is correct.

Q. On your card prices for the oxides, is there any differential that you hold to, on those card prices?

A. Our practice has been to move the card prices when pig leads hit an even ¼ up or down.

Q. Up or down?

A. Yes.

Q. If the price of pig lead was, say, 5.85 and it moved up to 5.95, the carload prices would move up 10 cents but the card prices would not?

A. That is correct.

Q. Then, if it moved back down to 5.75?

A. There would be a change.

Q. There would be a charge?

A. That is right.

Q. Or if it moved up to 6.05, there would be a change?

A. Yes.

Q. But in all cases the carload price is tied directly to the price of pig lead?

A. That is right.

Q. So is the card price, except it moves in quarters?

1620 A. That is right.

Q. Has that been the practice over that period of time? 15 years, did you say?

A. It has been the practice for quite a while. I do not know whether it is 15 years or 10 years.

Q. Mr. Zoller, are quotations of white lead on that same basis, dry white?

Mr. Hinds: If your Honor please, I object to the alternative use of card prices and quotations as though they were two separate things. It has already been shown that the card price is not a price, it is a quotation. I think we should have uniform terminology there, otherwise we will have confusion. I understand the so-called card price has been defined as not being a price but a quotation which you hope to get but you do not always get, and to have it introduced here as a price I think may lead us to some misconceptions.

Mr. Wright: I am only adopting the terminology that the companies themselves have used. In referring to these as card prices, I am perfectly willing to stipulate that they are quotations.

Trial Examiner Norwood: Well, terms must be considered in the meaning which has been established by the evidence. Proceed.

By Mr. Wright:

Q. Are the card prices or quotations of dry white 1621 similarly tied to the price of pig lead?

A. No, they are not.

Q. So that the price of pig lead might move up or down a good many times and perhaps more than a quarter and no revised price would be offered on dry white?

A. That is possible, yes, sir.

Q. That would also apply, would it, to the keg product?

A. I cannot answer that. I am not familiar with that.

Mr. Wright: I have no further questions, your Honor.

Trial Examiner Norwood: You may examine him.

Mr. Wood: No cross-examination.

Mr. Welch: No cross-examination.

Trial Examiner Norwood: You may be excused.

(Witness excused.)

Mr. Wright: Mr. Examiner, I have no other witnesses called for today. I believe Mr. Ewing has produced a good many documents in compliance with the subpoena, and if he

is willing to agree that we can go ahead and give those identification numbers overnight we can adjourn then until 10 o'clock in the morning.

Trial Examiner Norwood: All right. Is that agreeable to all of you gentlemen? If so, we will recess until 10 o'clock tomorrow morning.

(Whereupon, at 12:55 p.m., an adjournment was taken until 10:00 a.m., Friday, October 4, 1946.)

1622

Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
Friday, October 4, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

James T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N.W., Washington, D. C.), attorney for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq. and Edmund P. Wood, Esq., attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

James D. Ewing, Esq. and E. Z. Du Bose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), attorneys for National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), attorneys for The Glidden Company.

1623 Proceedings.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened for the purpose of taking further testimony at 10 a.m. on October 4, 1946.

Enter the appearances.

(Appearances, as heretofore noted on title page, entered.)

Trial Examiner Norwood: You may proceed.

Mr. Wright: Before we start, your Honor, the National Lead Company produced a large number of invoices and shipping memoranda on yesterday, pursuant to subpoena. I had thought that we could have them identified and offered today, but I find that that will be impossible, and I trust it will be all right with Mr. Ewing if we retain custody of these without having them further identified at this time, and take them up at a later date.

Mr. Ewing: That is perfectly satisfactory.

Mr. Wright: I will call Mr. Merson.

DAVID A. MERSON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

1624 Q. Mr. Merson, will you state your full name and position with the National Lead Company, for the record?

A. David A. Merson; manager of oxide sales, National Lead.

Q. How long have you been in that position, Mr. Merson?

A. Since 1938.

Q. Will you start with your first employment with National Lead Company and give us a resume of your duties and responsibilities?

A. I entered the employ of the National Lead Company in 1923 as a chemist in the research laboratories. Later I became a technical representative, working out of the laboratories for the company, and in 1938 was appointed to my present position.

Q. In your technical duties there, prior to assuming this position, did you work on technical problems with customers of National Lead or in the National Lead plants?

A. I worked with customers and in the laboratories, both.

Q. In other words, working out products which would suit their needs?

A. That is right, sir.

Q. So you are then thoroughly familiar with the sales policies of the National Lead Company, at least from 1938, on the oxides or dry pigments, is that correct?

A. Yes.

Q. That would include the red leads and litharges?

1625 A. Yes, sir.

Q. Mr. Merson, where does the National Lead Company produce oxides?

A. We have nine plants at which we produce oxides.

Q. Will you tell me where they are located?

A. Brooklyn, Philadelphia, Charleston, West Virginia, St. Louis, Chicago, Dallas, Atlanta, Los Angeles, and San Francisco.

Q. When did the National Lead Company acquire its Dallas plant?

A. They built the plant—I would have to guess.

Q. Approximately the date.

A. Around 1940 or 1941. That is a guess.

Q. In other words, they built the plant themselves?

A. We have another operation down there, and we simply added an oxide plant to the operation.

Q. When did the Atlanta operation start?

A. I would have to guess about that, also; about 1942.

Q. Was that a plant that National constructed?

A. Well, there, we also had another operation and simply added an oxide plant to an existing operation.

Q. How about the Charleston, West Virginia plant?

A. That was formerly, and still is, the Evans Lead Company which we purchased.

1626 Q. What was the date of that acquisition?

A. I would have to guess.

Q. Well, approximately.

A. I believe between 1931 and 1933, thereabouts.

Q. I see. You say that was a purchase. Was that a previously independent concern?

A. Yes, sir.

Q. What products did they produce prior to acquisition by the National?

A. Litharge and red lead.

Q. And it has been since operated as a division of National Lead, or is it a subsidiary corporation?

A. No, it is a division of National Lead.

Q. A division of National Lead?

A. Yes, sir.

Q. About what is the production of that plant, in percentage to the production of National, of red lead and litharge?

A. I would have to guess.

Q. Well, a rough percentage.

A. Around 10 percent.

Q. Around 10 percent of National's production. Do you recall the Carter White Lead Company?

A. Yes, sir.

Q. Was that company acquired by National Lead Company?

A. I am not familiar with that.

1627 Q. What is your recollection of the Carter White Lead Company?

A. Well, all that I know is that which I have heard since my employment with the company.

Q. You mean from other company officials?

A. That is right, sir. I heard that Carter White Lead Company was an independent white lead company which was acquired by the National Lead Company.

Q. Did that plant produce white lead or did it also produce oxides, or do you know?

A. No oxides.

Q. No oxides.

Do you know where the plants of that company were prior to its acquisition by National?

A. I am not certain. I know that one plant was in Chicago, at West Pullman.

Q. Do you recall if they had a plant at Omaha?

A. I believe they had the original plant in Omaha. Whether that was in existence when the company acquired Carter or not, I do not know.

Q. Do you recall the Wetherill Company in Philadelphia?

A. I have heard of them.

Q. Was that an operation that was acquired by National?

A. I do not know, sir.

Q. Now, Mr. Merson, am I correct in my under-
1628 standing that the National Lead Company makes a great many different grades and qualities and types of oxides?

A. Yes, sir.

Q. Will you state what a few of the most important of them are? And what trade designations and names the National Lead Company applies to them in their sales?

A. The storage battery oxides are described as storage battery litharge, storage battery red lead, Grenox.

Q. What is the Grenox?

A. It is a litharge used for storage battery purposes having a metallic lead content, free lead content.

Q. Do you also produce and sell a product called Zerox?

A. No, sir, we do not produce Zerox.

Q. Do you at times sell Zerox?

A. We have at times sold Zerox.

Q. Where do you obtain Zerox?

A. Where we would sell it we would obtain it from the Eagle-Picher Company.

Q. Is that the only company which produces that product?

A. It is the only which produces that product under that name that I know of.

Q. Do you have a comparable product?

A. Yes, sir.

Q. What do you designate your comparable product?

A. 111. There we have several letters after the
1629 111. In other words, we have several products comparable to Zerox, and they might be 111-B, 111-M, 111-R.

Q. And those are all then a compounded litharge that is produced especially for the battery trade, is that correct?

A. Yes, sir.

Q. What would 25-R oxide be?

A. That would be a blend, or rather a furnace color red lead containing about 25 percent of red lead and 75 percent of litharge.

Q. What is the No. 1 battery red lead?

A. I do not recall the characteristics of that.

Q. What would a 25-S oxide be?

A. That would be the same as 25-R, except that the particle size is different.

Q. In other words, it is screened differently; is that correct?

A. It is ground or screened differently.

Q. I see.

What is the special B litharge?

A. I believe that is a storage battery litharge, but I do not recall the characteristics.

Q. What is the cement litharge?

A. That is a litharge which is used for preparing a cement by mixing it with glycerin.

Q. When you say "cement", do you mean cement
1630 in the sense of Portland cement, or what?

A. No, sir, cement in the sense of sealing two dissimilar or similar articles together.

Q. In what industries?

A. Well, in the paper industry which maybe use them, and digesters for the sealing of joints.

Q. What is the Barton calcined litharge?

A. That is a litharge made by the Barton process and subsequently calcined in a mechanical furnace.

Q. What is the Barton process, briefly?

A. Well, it is a process in which you feed in molten lead to a chamber. The molten lead is agitated by means of a stirrer and at the same time is oxidized by an inflow of air containing oxygen and lead to form litharge.

Q. What processes are used for producing litharge and red lead at the Evans plant in Charleston?

A. They employ fume units for making fume litharge, and mechanical furnaces in which there are arms which travel around stirring the molten metal and exposing it to the oxygen of the air and thereby forming litharge.

Q. Is that latter method a more or less unique production process?

A. No, sir.

Q. Is the fume method a more or less unique process?

A. Well, it is unique in that we developed it our-
1631 selves. That is our method.

Q. Prior to acquisition by National was the Evans Lead Company employing any processes of production of oxides which were unique?

A. I do not recall that.

Q. In the sense of not being employed by other units in the industry?

A. I do not recall that.

Q. Do you recall what processes they were employing prior to your acquisition of them?

A. Well, as far as I can recollect they had the mechanical furnace and they had the fume units.

Q. Was anyone else at that time employing the mechanical furnaces?

A. Yes, sir.

Q. And the fume units, too?

A. Yes, sir.

Q. What is the product P-21, special litharge?

A. I am afraid I do not know, sir.

Q. What is 111-M negative oxide?

A. That is a compounded negative material containing litharge and carbon black blank fix and an organic expander, an organic substance.

Q. Is that comparable with the product Perox sold by Eagle-Picher Company?

1632 A. No, sir.

Q. Is it comparable to any of the Eagle-Picher varieties?

A. Zerox.

Q. Do you recall what 30-W oxide is?

A. Yes, sir.

Q. What is that?

A. That is a Barton process litharge containing free lead which is used in the storage battery industry.

Q. Do you recall hearing of an Evans process of oxides?

A. Evans process?

Q. Yes, sir.

A. I do not believe I recall hearing of an Evans process.

Q. Mr. Merson, I call your attention to Commission's Exhibit 806-B, -C, -D, -E, -F, -G, -H, and -i, which have been identified as price cards for various lead pigments by the Atlantic branch of the National Lead Company. I believe they were produced by National under subpoena. Do you recognize those cards as price quotations of National?

A. Why, they are cards similar to those that we have put out on occasion.

Q. Take 806-i which is effective January 14, 1942 and supersedes a list which apparently had been in effect since March 3, 1941, and represents an advance of three quarters

of a cent per pound. Can you tell the geographical territory to which these quotations would apply?

1633 A. Why, I would have to refer to that territory which is allocated to the Atlantic branch. We have such maps which delineate the territories of the various branches, but I am not familiar with those boundaries.

Q. Do I understand your answer to be that the quotations which appear there would only be applicable in the Atlantic branch?

A. Well, each branch issues its own price cards for its territory.

Q. Well, I call your attention now to a photostatic copy of Commission's Exhibit 615-D, which has been identified as a document produced by the National Lead Company, and under "Prices and Terms", under "Dry Red Lead", it refers to prices for delivery on less than 20 tons in one lot as the card price. It further sets forth a differential over the card price of 25 cents per hundred in the following states: In Alabama, Arkansas, all the way through to west of the Cascade Mountains in Oregon and Washington. Do you recall that as being the terms and conditions of sale on red lead by National at that time?

A. Yes, sir.

Q. In other words, those zone differentials were in effect at that time?

A. Yes, sir.

Q. Are they still in effect?

1634 A. As far as I can recall at the moment they are still in effect. There may be some difference today from what it was in 1941.

Q. Does the National Lead Company still quote a differential over par in Arkansas and Oklahoma?

A. I do not believe they do.

Q. Do you recall when that change was made?

A. No, sir.

Q. Some time between the date of this (indicating) and the present time?

A. Well, I would not say that. It has been made since 1938, when I was appointed to my present position. What year it was I do not know.

Q. Was it prior to the effective date of OPA ceilings?

A. I would say yes.

Q. Well, since this document, dated April 26, 1941, shows a differential applicable to those two states it ap-

parently was sometime between that date and the effective date of OPA ceilings; is that correct?

A. That is apparent.

Q. Were the same zones followed for sales of litharge in less than carload lots, in barrels?

A. Yes, sir.

Q. And the same differentials?

A. Yes, sir.

1635 Q. Were those same zones and differentials followed for similar quantities of the special oxides which you detailed here this morning?

A. Yes, sir.

Q. Can you state over what period of time those zones and differentials have been employed by National?

A. No, sir, I cannot.

Q. Were they employed when you assumed your duties in 1938?

A. They were in effect then.

Q. You were employed with National I believe in 1932.

A. 1923, sir.

Q. In 1932, you were in their employ?

A. Yes, sir.

Q. Do you recall whether these zones were in effect at that time?

A. I do not know, sir.

Q. I direct your attention to the material under (b) in Exhibit 615-D, quotations for deliveries of 20 tons or over in one lot. In par territory a flat price of $2.50 per hundred pounds over A. S. & R. price of common lead in New York in effect at the close of the market on the fifth day prior to the date of opening. I believe this is a government schedule here, so this applies to government business; is that correct?

A. Yes, sir.

1636 Q. And the statement that litharge is priced at $1.50 per hundred pounds over the A. S. & R. price of common lead. In the period from 1938, when you came into the executive office, and 1943, was it the practice of the National Lead Company, in quoting on carload lots, to quote on a differential of $2.50 per hundred pounds for red lead, and $1.50 for litharge over the A. S. & R. price of common lead in New York?

A. Generally.

Q. Do you recall over how long a period that practice obtained?

A. No, sir.

Q. You say "generally". Does that mean that that was your regular policy, to accept business at that price?

A. Yes, sir.

Q. So that when you did not it was an exception to your general terms of sale that you quoted?

A. Yes, sir.

Q. Now, I call your attention to the zones in effect under (b) on the carload business, where 25 cents per hundred pounds is added for deliveries in that series of states. Has that geographical division and differential applicable thereto applied to those offerings in the period of 1938 to 1943?

A. Generally.

Q. It has?

1637 A. The same exceptions might be true here as in the l. c. l. with regard to your question concerning Oklahoma and Arkansas.

Q. There may not have been that differential since sometime in 1941 or 1942?

A. Whenever it occurred.

Q. Yes. As I understand it then, these carload prices are at par then on the Pacific Coast, with the exception of territory east of the Cascades in Oregon and Washington?

A. Yes, sir.

Q. In other words, western Oregon, Washington and California are at the par territory.

Mr. Merson, these carload prices then which are tied directly to the A. S. & R. New York price of pig lead, how do they move, or in what units do they move?

Do they move in nickels or in quarters per hundredweight?

A. Carloads move generally in units of a dollar a ton or 5 cents a hundredweight.

Q. I see. So anytime the quotation on American Smelting & Refining Company at New York moves up or down a nickel your quotations on litharge and red lead in carload quantities automatically move up or down by that amount?

A. Yes, sir.

Q. What is the relation between the price of pig lead and the so-called card prices for the oxides?

A. They move with the nearest quarter.

1638 Q. In the nearest quarter?

A. Yes, sir.

Q. In other words, if the price of pig lead was $5.80 New York, it could go up to $5.95 and back down again to

$5.80 and there would still be no change in the quotations for card prices, is that correct?

A. That is correct, yes.

Q. But if it went up to $6, then the card would move up 25 cents a hundred?

A. That is correct, sir.

Q. Mr. Merson, is there any substantial difference in the quotations of prices and terms of sale on comparable products by the National Lead Company from those offered by the Eagle-Picher Company?

Mr. Wood: I object to that, your Honor.

Mr. Ewing: I object to the form of the question, "is there any substantial difference".

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Is there any difference?

Mr. Wood: I object to the question. It has not been shown that the witness knows the policies of the Eagle-Picher or that he knows any more about it than he has heard in this courtroom yesterday.

Trial Examiner Norwood: If he answers this question, we will know whether he does or not.

1639 Mr. Wood: I think the witness should be qualified before he attempts to answer.

Trial Examiner Norwood: I will let him answer. Objection overruled. If you do not know, you can say so.

The Witness: May I have the question, sir?

(The question was read by the reporter.)

The Witness: I cannot say that I know. The information which we receive is from prospects and customers.

By Mr. Wright:

Q. Mr. Merson, you heard Mr. Zoller testify yesterday, did you not?

A. Yes, sir.

Q. On the basis of his testimony yesterday, can you recall any differences in the quotations and terms of sale offered by the National Lead Company on these oxides?

A. Not generally.

Q. Can you particularize any differences?

A. No, sir.

Q. You cannot?

A. No.

Q. When the New York price of lead goes up 15 cents,

as I understand it, your quotations are automatically raised then 15 cents on your carload quantities of oxides.

A. Yes, sir.

Q. You do not attempt to ascertain what any of
1640 your competitors might be offering as the result of that?

A. That is our policy.

Q. That is your policy?

A. Yes, sir.

Q. You offer that regardless of anything that your competitors might do?

A. Yes, sir.

Q. Mr. Merson, you are familiar generally with the operations of your principal customers in these products, are you not?

A. To some extent.

Q. In other words, I believe, if I recall your testimony, that you worked with them on their technical problems in utilizing these materials.

A. Yes, sir.

Q. Are you familiar with the battery industry?

A. To some extent.

Q. Are they large consumers of oxides?

A. Yes, sir.

Q. Do you have any idea of how many battery manufacturers there are in the United States?

A. I can guess.

Q. Well, can you give us your guess, and we will find out what it is based on.

A. Well, about 200 to 225, maybe.

1641 Q. Are they located all over the country at various points?

A. Yes, sir.

Q. From Maine to California?

A. Yes.

Q. And from Florida to Oregon?

A. Yes, sir.

Q. Are some of these companies very large consumers of oxides, these battery companies?

A. Yes, sir.

Q. Who purchase on the carload basis?

A. Yes, sir.

Q. Is there any substantial number of these battery companies whose operations are so small that they purchase at the card price rather than the carload price?

A. Quite a few.
Q. Would you say the majority?
A. I would not say, I would not guess.
Q. A substantial number, at any rate?
A. Yes, sir.
Q. Do you recall how many pounds of oxides would go into an ordinary standard automobile battery?
A. It runs around 10 pounds. It may run 11, 12 or 13 pounds. The average might be between 10 and 11 pounds.
Q. Would the weight of the oxides in those batteries constitute a substantial portion of the weight of the
1642 finished battery?
A. I would say about around 25 per cent.
Q. Is the cost of the oxide substantial as compared to the cost of the finished battery?
A. If I knew exactly what the cost of the finished battery was I could give you a fair answer.
Q. Well, you recall observing the retail prices in the newspapers on storage batteries, do you not, automotive storage batteries?
A. Yes.
Q. Ranging somewhere from $9 to $15 and $17, isn't that true, somewhere in there?
A. Yes, sir.
Q. So that the cost to the manufacturer must be considerably less than that?
A. I would guess that, yes, sir.
Q. And 10 or 12 pounds of red lead on a card price would probably amount at least to a dollar, wouldn't it?
A. I expect so.
Mr. Ewing: I object. It is pure speculation. The witness has testified he does not know the cost of a battery to the battery manufacturer. To attempt to have him say what the cost of the oxide ingredient in the battery is as compared to the total is wholly indefinite.
Mr. Hinds: I have an additional objection which
1643 goes to the logic and relevancy of the question. It is patently not in the witness' knowledge. The factor which would be relevant at all would be the relative amount of oxide with respect to the weight of the battery, to establish the relative amount of conceivable differential of price of oxide to the total cost of the battery. That is the only relevant factor.
Trial Examiner Norwood: Read the question.
(The question was read by the reporter.)

Trial Examiner Norwood: He can tell us what that would amount to.

Mr. Ewing: He does not know.

Mr. Wright: I am willing to withdraw the last question. The record shows what 10 or 12 pounds of red lead or litharge would cost at any one of the different periods.

Mr. Ewing: My objection is that it is purely a speculation to say how much the cost of the oxide was as compared to the cost of the battery.

Trial Examiner Norwood: Objection sustained.

Mr. Wright: My sole purpose was to find what the witness knew about the business.

Trial Examiner Norwood: Go ahead.

Mr. Wright: It has been testified that is a very important consuming branch of the industry.

1644 Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Mr. Merson, how many pounds of ordinary litharge is produced with 100 pounds of pig lead?

A. We average about 5 percent gain in weight, which would make it about 105 pounds.

Q. Does that apply also to red lead?

A. Red lead would run around 9 to 10 percent.

Q. Gain?

A. Gain.

Q. In the process of manufacture?

A. Yes, sir.

Q. Do you know the gain on basic carbonate?

A. No, sir.

Q. Basic sulphate?

A. No, sir.

Q. Mr. Merson, can you state the percentage, roughly now, I do not mean by any precise figure of tonnage or dollars,—the percentage of production of oxide, including red lead, accounted for by National as compared with the total for the industry, say, in 1943?

Mr. Hinds: I would like to ask whether that includes those manufacturers who manufacture their own oxides or merely those such as these respondents that were selling it to others?

1645 Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Mr. Wright: Do I understand there is an objection to the question or Mr. Hinds is helping me ask the question?

Mr. Hinds: I think I implied an objection, and I now express one. The objection is on the ground that the question is ambiguous in that it fails to define what he means by "total production".

Mr. Wright: Well, your Honor—

Mr. Hinds: (Interposing.) Pardon me. I am in the middle of a statement.

Trial Examiner Norwood: The objection is overruled. That is something that can be stated. Answer the question, if you can.

Mr. Ewing: I think the basis for it, your Honor, is the fact that oxides are produced not only by companies that are in the business of producing oxides, such as National Lead and Eagle-Picher, but also by users who make their own oxides.

Trial Examiner Norwood: He confined his question to National.

Mr. Ewing: No, he did not.

Mr. Wright: I would in any case have had to qualify the answer that way, so I am willing to qualify the answer that way.

1646 Trial Examiner Norwood: I understood you had confined your question to National.

Mr. Ewing: To National's production as it relates to the total industry. My point is we do not know what the total industry is without further qualification.

Mr. Wright: I withdraw the question.

Trial Examiner Norwood: Well, the question is withdrawn.

By Mr. Wright:

Q. I believe it has been already testified to by another witness that the National Lead Company does report statistics on production and shipment to the Lead Industries Association.

A. Yes, sir.

Q. And that the Lead Industries Association reports back the total industry figures.

A. Yes, sir.

Q. Do you know whether those figures include the production of those people who produce and consume their own oxides?

A. No, sir, I do not believe they do.

Q. That just includes the figures of those who produce oxides for resale?

A. Yes, sir.
Q. Is that true?
A. Yes, sir.
1647 Q. Can you state roughly the percentage of the production and shipment of oxides by National as compared to the total of those who report to Lead Industries Association?
A. Yes, sir.
Q. In 1943?
A. Yes.
Q. What is that production?
A. I can give you a figure of 50 percent, plus or minus 5 percent.
Q. Would that apply over a period of years?
A. Yes, sir.
Q. Say since 1930 on?
A. Since 1938.
Q. Since 1938?
A. Yes.
Q. You do not know what it might have been prior to that time; is that correct?
A. No, sir, I do not know.
Q. Who are your principal competitors in these oxides?
A. Eagle-Picher—You mean by name?
Q. Yes, sir.
A. Eagle-Picher, Metals Refining, Hammond Lead, Fuller.
Q. Fuller is on the West Coast?
A. Yes, sir. Plus those people who manufacture oxides for their own use.
1648 Q. Is Sherwin-Williams—
A. (Interposing.) Mr. Wright, I should like to add another name, if I may.
Q. Yes, sir.
A. That is Sherwin-Williams.
Q. Is the Sherwin-Williams Company an important factor in the sale of oxides?
A. I would not say they were an important factor.
Q. You would not say they were?
A. No, sir.
Q. Would they produce as much as 5 percent, would you suppose?
A. Well, they may produce 5 percent. My interpretation of "important" is a good deal greater percentage than 5 percent.

Q. Do you find them as competitors in soliciting business for oxides from battery manufacturers?

A. No, sir.

Q. In what lines do you find them as competitors?

A. Chiefly in the paint line.

Q. In the paint line?

A. Yes.

Q. Red lead for paint?

A. Yes.

Q. Litharge for varnish?

1649 A. Not so much litharge as red lead for paint.

Q. Red lead for paint?

A. Yes, sir.

Q. Is the production of Hammond Lead products important in the industry?

A. I consider them important.

Q. What percentage would you surmise they account for?

A. I could not surmise.

Q. Would they be as important as Metals Refining? Would their production be that large?

A. Yes, sir.

Q. It would?

A. In my opinion.

Q. How about Fuller on the West Coast?

A. I do not know what their percentage would be.

Q. That is the only other lead plant on the West Coast outside of National's, is it not?

A. Right now, yes, sir.

Mr. Wright: Your Honor, may we have a 10-minute recess?

Trial Examiner Norwood: We will take a 10-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: You may proceed.

By Mr. Wright:

1650 Q. Mr. Merson, I direct your attention to pages 378, 379 and 380 of Commission's Exhibit 809, which is the code for the lead industry, and schedule A, articles I, II and III. I would like for you to state for me as we go over these provisions whether the practices of National Lead Company, in the period from 1938 to 1943, were in conformance with the provisions that appear in this schedule, and if not in what respect they differ.

A. I see.

Q. Now, under 4 of Article I(b), under "Price", the provision for allowance of not more than one-half cent per pound for minimum shipments of five tons for one buyer at one time to one destination. This refers to the less-than-20-ton orders, the card price orders.

A. Yes, sir.

Q. Has that been the practice of National?

A. Yes, sir.

Q. It has?

A. Yes.

Q. How about with reference to (c), the provision on protection against decline in seller's price?

A. Yes.

Q. That has been followed?

A. Yes, sir.

Trial Examiner Norwood: Answer a little louder, 1651 please.

The Witness: Yes, sir.

By Mr. Wright:

Q. The provisions of (d) which set out the differentials between the grades of red lead?

A. Yes, sir.

Q. Those have been followed?

A. Yes, sir.

Q. And also the terms for delivery and transportation allowance?

A. Yes, sir.

Q. Now, I call your attention to No. 8 there, the provision for net 30-day terms or 1 percent cash discount for payment in 10 days.

A. Yes, sir.

Q. And that has been followed?

A. Yes, sir.

Q. How about the provision under "9" for taxes?

A. As far as I know they have been.

Q. They have been?

A. As far as I know.

Q. Now, we come to Article II, the provisions regarding sales of oxides in lots of at least 20 tons. Those are your carload quotations?

A. Generally, yes, sir.

1652 Q. Now, under "5", the price, where it states, "Price shall be determined by adding a differential

as agreed upon by buyer and seller to the price of common lead at New York. The lead prices applying at each order to be specified by buyer at the time the order is placed. as"—and then there are three alternatives, (1) the American Smelting & Refining Company's quotation at the close of the market on the day the order is received, and (2) the quotation of American Smelting & Refining at a future date agreed upon, or (3) the average quotation.

A. We have followed that generally.

Q. You followed one of the three of those in quoting on those carload orders?

A. Generally, yes, sir.

Q. How about (c) under "5", the provision against decline in seller's price?

You followed that, too?

A. Yes.

Q. Is it also true you followed the provision for differential between grades of red lead?

A. Yes, sir.

Q. How about the provisions under "Transportation Allowance" and under "A", the allowance of freight paid by the buyer?

A. Generally, we have followed that.

Q. In that connection, in selling oxides at car-
1653 loads, does National Lead generally prepay the freight, or is the freight paid by the buyer and allowance made?

A. Well, it can be either, and it has been either.

Q. It has been either?

A. I do not mean we give them the option, but we have done both.

Q. What would you say, in the period between 1938 and 1943, was the more common practice?

A. I would not say. I think we have done them both, and I would have to refer to the various branches and their shipping papers and invoices to determine that.

Q. Could that fact be ascertained without considerable trouble to you, as a matter of finding what the policy was?

A. I believe so, yes, sir.

Q. Now, how about under "8", under "shipments", where it states, "shipment shall be made at least within 60 days from (a) the date on which the price of pig lead governs the sale or (b) the beginning of the period during which the average price of pig lead governs the sale"?

A. Generally, we have followed that.

Q. You have followed that. And the terms, "net 30 days with no cash discount", has that been your practice?

A. Yes.

Q. How about the provision under "10" for taxes?

A. As far as I know.

1654 Q. You have followed that?

A. Yes, sir.

Q. Are you qualified to state with reference to Article II on the sale of dry white lead?

A. No, sir.

Q. Mr. Merson, in quoting on these various grades and mixtures of oxides, Grenox, 25-S, 25-R, and 111 with the various subnumbers, are there card differentials as between those various products?

A. Are there card differentials?

Q. In other words, assuming now your card prices of litharge in par territory are $7.25, would your card prices of these other products be at a differential from that?

A. They would be considered litharges.

Q. They would all take that same price?

A. That is, the litharges would.

Q. The litharges would?

A. Yes, but the red lead would take the red lead price.

Q. I think you stated some of these products had as much as 25 percent red lead in them.

A. Yes.

Q. Would they be at a differential over the litharge price?

A. Yes, sir.

Q. Which products would those be?

A. The 25-B or S, or ST, or SC.

1655 Q. All those oxides with the 25 in the designation—that would indicate 25 percent red lead?

A. Generally, yes, sir, about 25 percent.

Q. What differential do you ordinarily quote those over the litharge price?

A. 25 cents.

Q. 25 cents a hundred?

A. Yes, sir.

Q. Are there other combinations of those oxides that take a differential above the litharge price?

A. Not unless they are red lead.

Q. Yes.

A. Which takes a differential over the litharge.

Q. Would you make a combination of half litharge and half red lead?

A. We do not make those. We may have, but it was not the common practice, or in any volume.

Q. In your carload contract on red lead, I believe you stated it was customary to quote $2.50 over the A. S. & R. New York price.

A. I did not say so, but that generally is our practice.

Q. Is that the 95 percent and less grade of red lead?

A. Yes, sir.

Q. And if it were 97 percent it would be a differential above that $2.50, is that correct?

1656 A. Yes.

Q. And 98 percent, it would be above that?

A. Yes, sir.

Q. What is the differential on 97 over 95?

A. 25 cents.

Q. And on 98 over 97?

A. Another 25 cents.

Q. So there would be a $3 differential over pig lead for the 98 percent grade?

A. Generally.

Q. Generally?

A. Yes, sir.

Mr. Wright: I have no further questions of this witness.

Trial Examiner Norwood: You may examine him.

Mr. Ewing: No cross-examination.

Trial Examiner Norwood: Thank you, Mr. Merson.

(Witness excused.)

Mr. Wright: I would like to recall Mr. McCarthy.

FRED K. McCARTHY was thereupon recalled as a witness for the Commission and, having previously been duly sworn, testified as follows:

Direct Examination.

Trial Examiner Norwood: You testified previously?

1657 The Witness: I testified in June.

Trial Examiner Norwood: You have been sworn then?

The Witness: Yes.

By Mr. Wright:

Q. Mr. McCarthy, are you conversant with the practices of National Lead Company in connection with the sale of basic carbonates of lead?

A. Yes, sir.

Q. Over what period of time?

A. Since about 1935.

Q. Are you familiar with Article III of the code provision as it appears in Commission's Exhibit 809?

A. I have seen it before, but it was non-operative at the time I was connected in this business.

Q. At what time was that?

A. Well, as I remember, the NRA sort of desisted after the Schechter case.

Q. In other words, the provisions of this article have not been followed by National Lead since the Schechter decision?

A. I would say instead there was no governmental compulsion.

Q. I did not ask you that. I asked you whether or not the National Lead Company had utilized the terms and conditions of sale in accordance with the provisions of Article III in the period from the Schechter decision to 1943. I refer you specifically to (b) on page 380, in 1658 line 5, "Contract Sales", paragraph 1.

A. That has not been followed for several years.

Q. Can you be more specific as to the time in which it has not been followed?

A. We have had no such contracts since shortly after Pearl Harbor, in 1942.

Q. Since 1942?

A. That is right.

Q. From the period 1933 to 1942 did you employ such contracts?

A. I can only say with certainty that we did have such contracts from 1935 to 1942.

Q. I see. Were those contracts in accordance with paragraphs 1 and 2, under "Contract Sales"?

A. Not as stated in this paragraph, no, sir.

Q. How did they differ from the way it is stated in those paragraphs?

A. On occasion undelivered balances from the previous quarter would be carried over into a succeeding quarter where it had not been physically possible to effect delivery before the expiration date of the quarterly contract.

Q. That was in the event of a physical impossibility on your part?

A. That is right.

Q. That was not a general policy of the company, though, was it, as to undelivered balances which had
1659 not been delivered for some other reason?

A. No, no.

Q. And did they carry protection against advance or decline?

A. That is right.

Q. On the undelivered portion to the end of the calendar quarter?

A. That is right.

Q. Under (c) on page 380, the price for carloads to one buyer, one destination, shall be not more than one-quarter cent per pound less than that charged for smaller quantities.

A. That is correct.

Q. Was that followed in those transactions from that period in 1935 to 1943?

A. Yes, sir.

Q. Did the National Lead Company in that period quote or offer generally any basic carbonates on the basis of a differential over the price of pig lead?

A. No, sir, not to my knowledge.

Q. So that in basic carbonates the largest quantity discount was a quarter of a cent for orders of 20 tons or more?

A. That is right.

Q. Irrespective of quantities beyond that?

A. That is right.

Q. I believe you heard the testimony of Mr. Mer-
1660 son regarding the relationship which has existed between the price of pig lead at New York and the card and contract prices of the oxides.

A. Yes.

Q. Has any such relationship existed as to basic carbonate in the period 1935 to 1943?

A. The relationship is fundamentally similar but it is not nearly as flexible. Card prices on pigments, that is, dry white lead and basic lead sulphate, do not normally change as frequently as those for oxides, because the pig lead market would have to move further and show signs of staying at the new position in order to warrant an increase or decline in dry white lead prices.

Q. The pig lead that is used in corroding basic carbonate also carries a differential above the common pig lead price, is that correct?

A. That is true. There is a 10-cent differential for the corroding grade.

Q. 10 cents a hundred pounds?

A. That is right.

Q. Is that true relative to the lead from which lead sulphate is produced? Is that common pig lead or corroding lead?

A. It is my understanding that our price of sulphate manufacture stemming as it does from an oxide, is
1661 not dependent upon the refined or corroding grade of pig lead.

Q. So you can use common pig lead in producing the sulphate?

A. Yes.

Q. Would it be fair to state that the National Lead Company is the leader in pricing basic carbonate?

A. We establish our prices on the basis of our cost without reference—

Q. (Interposing) Without reference to your competitors in any way?

A. Within the industry that is, but we are competitive with other pigments.

Q. So you sometimes change prices with regard to that?

A. Well, we would hold back sometimes because of very low priced competitive pigments.

Q. Can you recall, in the period 1935 to 1943, whether any of your competitors announced a price change in white lead, either carbonate or sulphate, prior to the National Lead Company?

A. Yes.

Q. Before any word had gotten into the trade that the National Lead Company was considering such a move?

A. On occasion we have learned of increases in prices of a number of other people, through consumers.

Q. Do you recall any instance of that?

A. Yes.

1662 Q. Will you state what it was?

A. It was in December of 1941, I think, when there was quite a lot of activity in the pig lead market.

Q. That was shortly prior to the time the OPA ceilings were on?

A. That is right.

Q. The price of pig lead had gone up sharply in that period?

A. Several times within the period of a month.

Q. Who announced the change prior to you at that time?

A. At this time I was in Cincinnati and Eagle-Picher had announced a change before we had been advised by New York.

Q. They had announced it generally to their customers?

A. Yes.

Q. What date was that, do you recall?

A. It was during the month of December but I am not sure just what date.

Q. Do you recall whether the announcement was effective as of that time or whether it had a future effective date?

A. When I learned of it, it was already in effect.

Q. It was already in effect. Do you recall the Carter White Lead Company, Mr. McCarthy?

A. Carter was an integrated part of National Lead at the time I came with the National Lead Company.

Q. Do you have any knowledge of the plants or
1663 facilities that the Carter Company had prior to its acquisition by National?

A. Carter was originally an Omaha firm, but years ago, probably before the last war, they transferred their operations to Chicago, and I think at the time National acquired Carter it was purely a Chicago operation.

Q. In other words, the Omaha plant had been closed prior to acquisition by National?

A. Yes.

Q. Do you recall when National acquired Carter?

A. It was before my time with the company, but I think it was in the 20s.

Q. Was Mr. F. M. Carter, who was later president of the National Lead Company, connected with the Carter White Lead Company?

A. Yes.

Q. He had been the principal party in that company?

A. It is my understanding Mr. E. J. Cornish came from Carter, too.

Q. Both Mr. Carter and Mr. Cornish came from Carter?

A. Yes.

Q. Do you recall Wetherill in Philadelphia?

A. Back in the 30s we were packing lead under the Wetherill brand as well as under the brand of Dutch Boy, and also John T. Lewis in Philadelphia.

1664 Q. Do you recall the acquisition of Wetherill by National?

A. No, sir, I do not. We discontinued the use of the brand back in the 30s.

Q. Would you be able to ascertain from the records of National when that acquisition was made?

A. I assume the minutes of the Board would show. That information could be developed.

Mr. Wright: No further examination.

Mr. Ewing: Just a second. I assumed, perhaps erroneously, with respect to the testimony adduced this morning from Mr. Merson and Mr. McCarthy, with respect to the provisions of the code and relationship between those provisions and the continuance of business since, that the objection to that general line of testimony made yesterday in connection with Mr. Zoller's examination would apply here, without the interruptions to make the objection now. I would like to have the record show that.

Trial Examiner Norwood: That was our understanding.

Mr. Wright: That was my understanding, that the objection to all the NRA stuff was preserved for all counsel all the way through.

Mr. Ewing: At the hearing in New York, Mr. McCarthy was questioned with respect to the tonnage of white lead or dry basic carbonate and basic sulphate produced by National in 1943 in round figures. At that time he felt

1665 that was a matter of such a nature that he would regard it as confidential and would not disclose it, and, accordingly, refused to testify on that point. It now appears in this case that similar testimony has been received from all the other respondents who produce those products, and under the circumstances I would like to have Mr. Wright, if he would, reput that question to Mr. McCarthy and he would be permitted to answer it.

Trial Examiner Norwood: He may do so.

By Mr. Wright:

Q. Mr. McCarthy, are you prepared to state the approximate percentages of the production of National Lead Company to the total industry production in 1943?

A. Of which product?

Q. Of dry white.

A. About 30 percent.
Q. How about 1942?
A. About the same.
Q. 1933?
A. It has been in the neighborhood of 25 to 30 percent for years.
Q. In other words, somewhere around 30 percent would be correct over that whole period back of 1943 for 10 or more years?
A. That is right.
Q. Will you state the percentage in 1943 of white lead in-oil?
1666 A. Approximately 60 percent.
Q. Would you answer the same as to the relative proportion over a period from, say, 1932 to 1943, as to white lead in-oil?
A. That has varied on a downward trend.
Q. In other words, it would have been higher in 1932 than it was in 1943; is that correct?
A. I would imagine, from what I heard, that the proportion was slightly larger then and has declined since.
Q. So it might have been as much as 70 percent in 1932?
A. I could not state with accuracy. That was before my time with the company.
Q. I see. Mr. McCarthy, going back to the price change that you mentioned, that you learned of with reference to Eagle-Picher, was that for dry basic carbonate or white lead in-oil?
A. That was for sulphate and carbonate, dry.
Q. That was for dry sulphate and carbonate?
A. That is right.
Q. That did not affect white lead in-oil?
A. Not at that time.
Mr. Wright: No further examination.
Mr. Ewing: No cross-examination.
Trial Examiner Norwood: Thank you, Mr. McCarthy.
(Witness excused.)
Mr. Wright: May we go off the record a minute?
1667 Trial Examiner Norwood: Off the record.
(Discussion was had outside the record.)
Mr. Wright: Your Honor, I suggest we now adjourn over until October 17 here in Washington. I will try to advise counsel in the interim of my plan, so if it is possible to save them a trip to the hearing I will make every effort to do so.

Mr. Wood: I want to make this statement on the record, that I am very much surprised by the fact that the Commission's case is as nearly closed as Mr. Wright has stated. I have not been objecting to certain lines of testimony because I did not want to encumber the record or slow down the proceedings. The type of testimony which I have in mind is exemplified by the testimony of Mr. Zoller yesterday and Mr. Merson this morning in respect to differences between carload and card prices on litharge. I think that testimony has no point in the case unless it is supplemented by other testimony in respect to what it means in the industry, if anything. Now, I frankly do not know whether Mr. Wright is going to try this case as a freight rate case or whether he is going to make a point of that type of thing. Now, if it is the latter, I want to reserve my right to move that that type of testimony be stricken, if it is to stand alone.

Trial Examiner Norwood: Counsel can move to strike it anytime he wants to.

1668 Mr. Wood: I haven't objected, your Honor, I just wanted the statement on the record that it is my position that that testimony is incompetent.

Trial Examiner Norwood: The testimony would have been ruled on at the time it was offered if counsel had objected.

Mr. Wood: It might have become pertinent if backed up by other testimony later.

Trial Examiner Norwood: I always lean against having the failure to object work to the prejudice of any counsel.

Mr. Wright: What Mr. Wood is really objecting to is the manner in which the case is handled. I think he has got a legal question there regarding the insufficiency of the evidence, rather than anything which goes to the admissibility or competency of the evidence in the first place.

Trial Examiner Norwood: Well, gentlemen, that matter can go over. The motion will be allowed, to recess. After consultation with counsel on both sides I find it will be convenient for us to meet here on the 17th. So the motion is allowed and the hearing is adjourned until 10 o'clock a. m. on October 17 in this hearing room, 332, office of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 12:15 p. m., October 4, 1946, an adjournment was taken until 10:00 a. m., Thursday, October 17, 1946.)

1669 Room 332, Federal Trade Commission Building,
Washington, D. C.,
Thursday, October 17, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:
John W. Norwood, Trial Examiner.

Appearances:
Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

1670 PROCEEDINGS.

Trial Examiner Norwood: The hearing will be in order.

Pursuant to adjournment on October 4, the hearing in Docket 5253 is now convened in room 332, offices of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a. m., on the 17th day of October, 1946.

Enter Mr. Wright for the Commission.

There appear to be no other attorneys here, for the respondents.

Mr. Wright: May I say, your Honor, I advised the respondents by telegram on Monday of this week that we would be unable to hold to the schedule we made for a hearing here today, and that I would merely request an adjournment of the hearing to a later date. In that connection, I advised counsel that I was moving for an adjournment to October 29, but in order to avoid running too close on that date I now would like to suggest that we adjourn to November 6 here in Washington.

Trial Examiner Norwood: Do you think counsel for the respondents would be satisfied with that?

Mr. Wright: There has been no opportunity to consult with them about that later date.

Trial Examiner Norwood: Will you advise them immediately, so that they will not make other arrangements?

Mr. Wright: Yes, sir.

1671 Trial Examiner Norwood: The motion is granted to postpone the hearing to November 6, 1946, in room 332, offices of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a. m.

The hearing will stand adjourned until that date.

(Whereupon, at 10:06 a. m., an adjournment was taken until 10:00 a. m., November 6, 1946, in room 332, offices of the Federal Trade Commission, Washington, D. C.)

1672 Room 1123, New Post Office Bldg.,
Chicago, Illinois,
November 13, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

1673 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to agreement of counsel and due notice, the hearing in Docket 5253 is now convened in Room 1123, New Post Office Building, Chicago, Illinois, at 10 o'clock a. m., November 13, 1946.

Mr. Reporter, you will enter the appearances.

I might say one thing, so that counsel may make their arrangements. We had scheduled here a hearing for Washington on November 6—

Mr. Wright: (Interposing.) Your Honor, pardon me for interrupting, but I have a witness here who is very anxious to catch a 12 o'clock train. I wonder if we could call him now, and then we have several things to discuss with counsel after we have finished with this witness; we can take up the matter of the schedule of the other hearings at that time.

Trial Examiner Norwood: Call your witness.

Mr. Wright: Mr. Chamberlain.

J. B. CHAMBERLAIN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

1674 Q. Mr. Chamberlain, will you state your full name and address for the reporter?

A. J. B. Chamberlain, Commander Battery Manufacturing Company, 4221 West Kinzie Street, Chicago.

Q. Is the Commander Battery Manufacturing Company a corporation?

A. Yes, sir.

Q. Are you an officer of the corporation?

A. President.

Q. You are President?

A. Yes, sir.

Q. What is the business of the Commander Battery Manufacturing Company?

A. Manufacturing automotive starting and lighting batteries.

Q. For how long a time has this company been engaged in that business?

A. It was incorporated in 1937.

Q. Has it been engaged in the business continuously since that time?

A. Yes, sir.

Q. How long have you been with the company, Mr. Chamberlain?

A. Since its start.

Q. Over how long a period of time have you been in the battery business? Were you connected with it prior to that time?

A. I have been in the battery business since 1921.

1675 Q. What is the normal average annual output of batteries by the Commander Battery Manufacturing Company?

A. An average of about 50,000.

Q. Fifty thousand batteries, that is per year?

A. Yes.

Q. Did I understand you to say that these were automotive starting and lighting and ignition batteries?

A. That is right.

Q. What are your normal market areas for these batteries?

A. Within a radius of 300 miles of Chicago.

Q. In every direction, is that?

A. Well, we go up north as far as Duluth; west as far as Des Moines, well, we have one exception, we do go as far as Yankton, South Dakota; and Evansville on the south; and Cleveland on the east.

Q. To what type or class of customers do you usually sell?

A. Automotive jobbers.

Q. Automotive jobbers?

A. Yes, sir.

Q. Do you do any business with fleet operators?

A. No, we don't.

Q. And your customers all purchase for resale, then?

A. That is right.

Q. Under what brand or trade names are the batteries you manufacture sold?

1676 A. We have two brands, the Combat and the Interstate.

Q. Do you make any private brand batteries?

A. We make some, yes.

Q. For whom do you make those?

A. For the last few years we have made some for Sears, Roebuck, and the Harrison Wholesale here in Chicago.

Q. From whom do you purchase lead oxides?

A. From Hammond Metal Products and Eagle-Picher.

Q. On what price basis do you purchase from those companies?

A. We buy in carload quantities.

Q. Carload quantities?

A. Yes.

Q. Is that price figured on a differential over the price of pig lead, do you know?

A. Yes, it is.

Q. About how many sizes and types of batteries do you manufacture?

A. Seventeen sizes are stocked.

Q. What are your principal items, the ones that account for the largest part of your production?

A. Well, there are about 6 sizes that constitute 80 percent of the volume.

Q. Do you make a 3-cell, 15-plate, 100-hour amp. battery?

A. Yes, we do.

Q. Is that one of your principal items?

1677 A. Yes.

Q. Do you know how many pounds of lead oxides go into the manufacture of that particular battery?

A. Offhand, I couldn't give you the exact amount in oxides, but there are around 23.7 total lead in that battery, and say roughly about 11 pounds would be oxides.

Q. Eleven pounds would be oxides?

A. Approximately.

Q. And they would be both positive and negative oxides?

A. That is correct.

Q. Would that quantity relation obtain over the whole period of time from 1937, on, that your company has been in business?

A. Oh, there have been a few changes in thicknesses of plates, and so forth, but that would be approximate, yes.

Q. Are you familiar with your costs, material costs of production on that 3-cell, 15-plate, 100-hour amp. battery, Mr. Chamberlain?

A. Well, I haven't got the figures with me; I couldn't give you that as to the material costs, no.

Q. Can you give us an approximate material cost?

A. You mean our factory cost, material cost?

Q. Yes, sir.

Mr. Welch: Mr. Examiner, we object to an approximation when the figures are available. We think as far as we can, we should proceed on an exact situation rather

1678 than approximations.

Trial Examiner Norwood: Can you show the exact figures?

Mr. Wright: Your Honor, I am trying to develop just what the witness is prepared to testify to here. I think that if his testimony is so vague and unreliable that it doesn't have any probative value, it is subject to a motion to strike on that particular ground.

Trial Examiner Norwood: I think the witness may go ahead and give us the best information he can on it.

Mr. DuBose: Just a moment. I don't understand the question. Does that include labor costs, or are you trying to pin it down just to material costs?

Mr. Wright: We haven't gotten an answer on it yet, Mr. DuBose. I am trying to ascertain how much Mr. Chamberlain is prepared to testify to.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Can you give us an approximate material cost?

"A. You mean our factory cost, material cost?

"Q. Yes, sir.")

Trial Examiner Norwood: Objection overruled. Answer the question.

Mr. Wood: I object to the question, Your Honor.

1679 Material cost might include a great many different things.

Trial Examiner Norwood: You can cross-examine him on that.

Mr. Wood: It seems to me it ought to be directed to lead oxide. We are perfectly willing to have him state what his cost of lead oxide is, but material cost might include the battery case and all sorts of things extraneous to this inquiry.

Trial Examiner Norwood: Objection overruled. We can get to that later.

Mr. Wright: I will withdraw the question, Your Honor.

By Mr. Wright:

Q. Mr. Chamberlain, what is your cost on a case for the battery about which we were speaking?

A. Well, in the Group 1, the composition case I believe now is 51 cents.

Q. What is the cost of separators that go into that?

A. They are $6.65 a thousand, and there are 42 used, so I would have to figure it out for you.

Q. Well, that won't be necessary. Forty-two are used at the price of $6.65 a thousand?

A. That is correct. That is in the ordinary wooden separator battery. Also fiber glass is used in the better grade battery.

Q. How much do those fiber glass separators cost per thousand?

1680 A. They run around $4.00 a thousand.

Q. What other materials than metallic lead, lead oxides, case and separators go into the manufacture of a battery?

Mr. Welch: Will you read the question, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

A. Well, the principal parts are the case, covers and

vent caps, separators, and then your lead oxide and pig metal. I don't know whether I mentioned sulphuric acid or not, but that covers it.

By Mr. Wright:

Q. You use sulphuric acid as your electrolytic agent that you add to the battery to make it operative?

A. That is right.

Q. Is the cost of the lead oxides, then, a very substantial part of the material costs that go into the battery?

Mr. Welch: Objection. Let him state what the cost is.

Trial Examiner Norwood: Objection overruled.

A. Well, the lead in its various forms is the principal cost of a battery.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

1681 By Mr. Wright:

Q. Mr. Chamberlain, you mentioned that they used 42 separators in a battery, and that they cost $6.65 a thousand; that the case of the battery cost 51 cents per battery. You also mentioned covers and caps as a material that went into the battery.

A. That is correct.

Q. What is the cost of those, do you recall that?

A. Well, the vent caps are $1.30, I believe, a thousand. I am not sure of the definite figure.

Mr. DuBose: Is that the cost to you, just to keep the record straight?

The Witness: That is correct.

By Mr. Wright:

Q. How many vent caps are used on that battery?

A. Three.

Q. What is the cost to you of the covers?

A. Around 12 cents for a battery, I believe.

Q. You mentioned the vent caps, the covers, the case, the separators, and the oxide and the metallic lead. Is there any other material, now, as distinguished from labor cost, that goes into a battery?

A. Sulphuric acid.

Q. Approximately what is the cost, per battery, of sulphuric acid?

A. Around 6 cents a battery.

1682 Q. Mr. Chamberlain, in the market areas that you have mentioned, do you compete with the National Battery Company?

A. Yes, we do.

Mr. DuBose: I object to this whole line of questioning as immaterial and irrelevant.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Willard?

A. Yes.

Q. Exide?

A. Yes.

Q. Auto-Lite?

A. Yes.

Q. Gould?

A. Yes.

Q. Firestone?

A. Yes.

Q. The Western Auto Supply?

A. Well, we don't sell in the Western stores, and they have their own brand, but their stores compete with our dealers.

Q. They compete with your dealers?

A. Yes.

Q. Sears Roebuck?

A. Well, yes, naturally we have got competition from their stores.

1683 Q. All over the market area which you mentioned?

A. That is correct.

Q. Montgomery Ward?

A. Yes.

Q. Atlas?

A. That is the Standard Oil?

A. Yes.

Q. Do you know who makes that battery?

A. No, I don't.

Q. Do you know who makes the bulk of the Sears Roebuck batteries?

A. Yes.

Q. Who is that?

A. Globe Union.

Q. Do you know who makes the bulk of the Montgomery Ward batteries?

Mr. DuBose: I renew my objection, if Your Honor please.

I think he is going far afield. I don't see the relevancy of this to our case, of any of this testimony.

Mr. Welch: I would like to add a further objection. There has been no testimony at all that the Commander Battery Company is a retail seller of batteries, and obviously the competition afforded by Western Auto Supply, Sears Roebuck and Montgomery Ward is at the retail level.

Mr. Wright: The witness just testified a moment
1684 ago that he knew that those companies competed with the dealers to whom he sells.

Mr. Welch: He hasn't shown any basis for such knowledge.

Trial Examiner Norwood: The objections are overruled.

By Mr. Wright:

Q. Do you compete with Delco?

A. Yes, sir.

Q. As to Delco, National, Willard, Exide, Auto-Lite, and Gould, are they direct competitors with you for the business of distributors?

A. Certain ones of those are, yes. National is; Auto Lite is; and also Delco.

Mr. DuBose: That is National Battery Company?

The Witness: National Battery Company, yes.

Mr. DuBose: Just to keep the record straight.

By Mr. Wright:

Q. As to Firestone, Sears Roebuck, Montgomery Ward, Western Auto Supply and Atlas, do they compete with you for dealer business?

A. Very little.

Q. Do they compete with your customers, to your knowledge?

A. They have their assured outlets through their standard stations.

1685 Q. Do you compete with Coliseum?

A. Yes.

Q. Volta?

A. Yes.

Q. Monark?

A. Yes.

Q. Bowers?

A. Yes.

Q. Reading?

A. No, we have very little competition from Reading.

We don't get into their territory, and they don't get into ours.

Q. American in Kansas City?

A. Very little.

Q. Federal Battery here in Chicago?

A. Yes.

Q. Goodyear?

A. Indirectly.

Q. How do you mean, indirectly?

A. Well, as I said, on the same basis as I did before, their stores are competing with our dealers.

Q. Globe Union?

A. Yes.

Q. Mr. Chamberlain, is the present market situation in the battery business a normal one, would you say?

A. A very abnormal one right now.

1686 Q. Is there a distinct shortage of batteries at the present time?

A. Yes, there is.

Q. Would you say that the period of time from 1936 to 1941 was a more normal competitive time?

A. Well, it was far more normal—

Mr. DuBose: (Interposing) I object to this line of questioning. The witness hasn't been qualified as an expert.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Mr. Chamberlain, what was your margin of profit during the period from 1937 to 1941 on your standard Group 1 SLI batteries?

A. Around 25 per cent.

Q. Around 25 per cent?

A. Yes.

Q. Was that a closer margin than you presently make?

A. Yes, we weren't making that same margin before the change now. I don't know what the devil the prices are.

Q. Did you figure to make that 25 per cent on your full line of batteries, on each item?

A. No, we didn't.

Q. Were there some items where you made less than 25 per cent?

A. That is correct.

1687 Q. What items were those?

A. The most competitive battery in the Group 1 was down to where there was no margin of profit.

Q. That was a—

A. (Interposing) 13-plate battery, 60 ampere hour.

Q. What was your selling price on that battery in that period?

Mr. DuBose: What period is this?

Mr. Wright: We are talking about the period from 1937 to 1941.

A. During that time the jobber price got down as low as $2.45.

By Mr. Wright:

Q. That is $2.45 a battery?

A. That is right.

Q. Did you make any profit on selling that battery at that price?

A. As I said, there was no margin of profit; actually if you took the proportion of overhead it was sold at a loss.

Q. So you had to sell a higher profit battery in order to make up your loss on that?

A. That is right.

Q. Were any of the companies that we named a few moments ago as competitors of yours, leaders in driving the prices of that battery down to that point?

Mr. Welch: I object.

1688 Mr. DuBose: I object to that.

Trial Examiner Norwood: I think that you had better bring out the facts—

Mr. Wright: (Interposing) I withdraw the question, Your Honor.

By Mr. Wright:

Q. Do you recall the price at which the Bowers Battery Company was selling that 13-plate battery in the Chicago area during that period from 1937 to 1941?

Mr. DuBose: I object, Your Honor, and if it is relevant, let's have the actual figures and not this witness' hearsay recollection.

Mr. Wright: This witness is the President of a battery company which has been in business since 1937, and obviously is very familiar with it. If he knows the price of his competitors during that period, I think it is competent for him to testify to it.

Trial Examiner Norwood: Let's read the question, and I—

Mr. DuBose: I think it is irrelevant; but if it be relevant, then let's get the actual figures.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Do you recall the price at which Bowers Battery Company was selling that 13-plate battery in the
1689 Chicago area during that period from 1937 to 1941?")

Mr. Hinds: I object to that. Let's have—

Trial Examiner Norwood: (Interposing) Objection overruled.

Tell us whether you recall that price or not.

Mr. Wood: Let him say whether it was 1937 or 1941.

Trial Examiner Norwood: Answer yes or no.

The Witness: I couldn't state definitely, no. I know that we were competitive, and we had to be down to that level to compete, but I can't say definitely what they did sell at.

By Mr. Wright:

Q. Do you recall any quotations of Sears Roebuck at retail for batteries during that period, that 13-plate battery?

1690 Mr. DuBose: The same objection, if Your Honor pleases.

Trial Examiner Norwood: Do you say that he can't tell what those prices were at that time, if he recalls them?

Mr. DuBose: No. I think in the first place it is irrelevant, and in the second place, if it is relevant, let's have the exact figures.

Trial Examiner Norwood: I think this is relevant; it goes to the conditions in the lead trade, and numerous things.

Mr. Welch: This testimony is not the best evidence as to what some other store's price on batteries was.

Mr. Wood: If Your Honor please, I am perfectly willing to have go into the record the price of any concern in the United States at any specific time, if it is an accurate price and an accurate time. But I can't see the point of just—

Trial Examiner Norwood (Interposing): Do you think the price can only be shown by some written document?

Mr. Wood: No; if this man knows the price of a given company's product at a given time, he can certainly testify to that.

Mr. Wright: That is all he is being asked.

Mr. Wood: No, he is being asked to testify generally over a five year period.

Mr. Hinds: Will Your Honor hear me on that objection?

1691 Trial Examiner Norwood: Yes.

Mr. Hinds: I would like to point out that the effect of allowing a competitor to come in and tell of his so-called knowledge or information as to the prices of these other competitors would necessarily be to put us, who are not expected to have the burden of proof on this subject, to the burden of bringing in the true prices. In other words we have nothing reliable here whatever, not even prima facie accuracy, and we then have the burden of coming in and disproving that this hearsay is actually the price. I say that even though the strict rules of evidence don't apply—

Trial Examiner Norwood (Interposing): There is no hearsay elicited by that question. He asked him if he knew what the price was.

Mr. Hinds: That is pure hearsay in this case unless he was actually present and heard the transaction, or saw the documents.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Do you recall any price quotation of Sears Roebuck & Company over the period from 1937 to 1941 on the 13-plate battery?

A. No, I don't.

Q. The type of battery we are discussing.

A. No.

Q. Mr. Chamberlain, you stated that your price
1692 to dealers got as low as $2.45—

A. (Interposing): That is to the jobber, not to the dealer.

Q. Yes—and that you were suffering a loss on that battery at that price?

A. Yes, it wouldn't carry its full proportion of overhead.

Mr. Wood: I object to the phrasing of the question, "suffering a loss". Obviously that was a loss leader in the industry and it was a voluntary loss that was taken to promote the sale of other batteries, and the term "suffering a loss" I think is inappropriate.

Trial Examiner Norwood: I can't follow that Mr. Wood; the objection is overruled.

By Mr. Wright:

Q. What was your normal list price on that battery to distributors?

Mr. DuBose: During what period, Mr. Wright?

Mr. Wright: During the period in which he sold it for $2.45.

The Witness: May I have that question again?

By Mr. Wright:

Q. What was your normal list price on that 13-plate battery to distributors?

Mr. DuBose: I won't object to that question if we can have the term "normal" defined.

Mr. Wright: I will examine him further on that if I can get his answer to this question.

1693 The Witness: $5.95.

By Mr. Wright:

Q. At what time was that?

A. August, 1941, in a published sheet.

Q. That was a sheet in which you published your list prices?

A. I don't have the price sheet for the lowest time. At that time the jobber price was $2.98, in August of 1941.

Q. What was the $5.95 price? Was that the consumer price, the list price?

A. The consumer price.

Trial Examiner Norwood: What do you mean by "normal" price?

The Witness: I don't recall using the word "normal".

Mr. Wright: He stated what his list price was.

Trial Examiner Norwood: You didn't use that word in your answer?

Mr. Wright: No, he did not.

By Mr. Wright:

Q. Were there, to your knowledge, batteries which were offered to the trade at a lesser price than yours during that period?

A. Well, it would be only hearsay—yes—

Mr. DuBose: I object to any hearsay and move to strike the answer.

1694 By Mr. Wright:

Q. Were you informed?

A. I was informed by our salesmen—

Mr. DuBose (Interposing): I again object, please.

Trial Examiner Norwood: Read the record, please.

(The reporter read the record as requested.)

Trial Examiner Norwood: Were these prices reported to you during the regular course of business?

The Witness: Yes sir.

Trial Examiner Norwood: In the regular course of your business?

The Witness: Yes.

Trial Examiner Norwood: I am going to overrule the objections because that is not inadmissible hearsay.

By Mr. Wright:

Q. Mr. Chamberlain, you stated that at the time the price of that battery was $2.45 you incurred a loss as the result of selling at that price?

A. That is right.

Q. When you set that price at that point did you do so because of the competitive prices you encountered in the market area?

Mr. DuBose: That is objected to.

Mr. Welch: Objection—leading.

Trial Examiner Norwood: Sustained.

1695. Mr. Wright: Your Honor, did I understand you to say that you sustained that objection?

Trial Examiner Norwood: Yes, as leading. Ask the witness, don't tell him.

By Mr. Wright:

Q. Why did you set your price at that point, Mr. Chamberlain?

A. To be competitive.

Q. To be competitive?

A. Yes.

Q. It was not your intention, then, to use that battery as a loss leader to attract business?

Mr. Welch: Objection.

Trial Examiner Norwood: The objection will be sustained. Ask him why he made that price.

Mr. Wright: I will withdraw the question, Your Honor.

By Mr. Wright:

Q. During the period from 1937 to 1941 was the storage battery business a highly competitive one?

A. Very highly competitive.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross examine.

Mr. Welch: May we have a few minutes' recess?

Mr. Wood: Five minutes?

Trial Examiner Norwood: We will have a five
1696 minute recess.

(A short recess was taken.)

Trial Examiner Norwood: All right, proceed.

Cross Examination by Mr. Wood.

Q. Did you say that you bought lead oxide from the Hammond Lead Company?

A. That is right, of Hammond, Indiana.

Q. Why do you buy from them?

A. Well, when I took over the company in 1937 they were already purchasing from them, and we just continued.

Mr. DuBose: Pardon me, you discontinued?

The Witness: Just continued to buy from them.

By Mr. Wood:

Q. Are their products of equal quality with the products of other lead manufacturers?

A. Our tests indicate that we can get just as good results from their oxides as from others.

Q. Are their prices competitive?

A. We have a better price, a lower price from Hammond than we do from Eagle-Picher.

Q. Why do you buy from Eagle-Picher?

A. Well, I can't say definitely why. We like their oxides.

Q. Is there anything individual about Eagle-Picher oxides?

Mr. Wright: I object—

1697 The Witness: (Interposing): We are using Eagle-Picher lead for our negative plate and we get a satisfactory plate and like it.

Trial Examiner Norwood: What was the ground of your objection, Mr. Wright?

Mr. Wright: There was nothing in the direct examination about this line of questioning, and it seems to me it is improper on cross, and I object to it.

Mr. DuBose: The whole line of questioning on direct was about the competitive situation, and certainly this line of testimony is perfectly relevant to that.

Trial Examiner Norwood: The objection is overruled.

By Mr. Wood:

Q. Do you get good technical service from Eagle-Picher?

A. Yes, we do.

Q. And good consulting service?

A. Yes.

Q. And that you value?

A. Greatly.

Q. When was your company organized?

A. It was incorporated in 1937.

Q. Before 1937 what was your occupation?

A. Manufacturing storage batteries. I was employed by the Amplus Storage Battery Company.

Q. So that in 1937, when your company was or-
1698 ganized, you were very familiar with the battery business?

A. That is right.

Q. And you knew it was a very highly competitive business at that time?

A. That is right.

Q. And you saw an opportunity to make money in it?

A. That is right.

Q. And you were highly familiar with all of the prevailing practices relating to the sale of lead oxides and lead products at the time?

A. That is right.

Q. And you still thought that your company could go into that competitive situation and make money?

A. That is right.

Mr. Wood: That is all.

Redirect Examination by Mr. Wright.

Q. Did you appear here as the result of a subpoena?

A. Yes, I did.

Q. Did anyone connected with this case, or the Federal Trade Commission, advise you or consult with you regarding your appearance as a witness here prior to the receipt of that subpoena?

A. No sir.

Mr. Wright: That is all.

1699 *Recross Examination by Mr. DuBose.*

Q. You did receive a letter from the Federal Trade Commission?

A. Yes, I did.

Q. And it asked you certain questions?

A. Pardon?

Q. Did that ask you certain questions?

A. Yes.

Q. So you were familiar with the type of questions the Federal Trade Commission would ask you today, were you not?

A. No, I was really surprised to hear the questions that have been asked because I was not at all prepared to answer the questions that have been asked.

Mr. Wright: Did you receive that letter prior or subsequent to the time you received the subpoena?

The Witness: After the subpoena.

Mr. Wright: No further questions.

Mr. DuBose: No further questions.

Trial Examiner Norwood: Off the record.

(Discussion off the record.).

Trial Examiner Norwood: On the record. The witness is excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

1700 Trial Examiner Norwood: Call the next witness.

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. Wright: On the record.

Trial Examiner Norwood: On the record.

Have you a subpoena?

Mr. Arnst: I did not bring it with me. I left it home.

Trial Examiner Norwood: Mail it to me, if you want the fee. Are you from Chicago?

Mr. Arnst: Yes.

Trial Examiner Norwood: Give your full name to the reporter.

Mr. Arnst: Emil Arnst—A-r-n-s-t.

EMIL ARNST was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Mr. Du Bose: Your Honor, I do not recall whether the prior witness was sworn in.

Mr. Wright: I believe he was.

Trial Examiner Norwood: I recollect that.

Direct Examination by Mr. Wright.

Q. Mr. Arnst, what is your address and business affiliation?

1701 A. I am the vice president and production manager of the Universal Battery Company.

Q. Where is that company located?

A. 3410 South LaSalle, Chicago, Illinois.

Q. Is that a corporation?

A. Yes.

Q. How long has it been engaged in business?

A. About 47 years.

Q. All that time, here in Chicago?

A. In Chicago.

Q. How long have you been connected with the company?

A. Since 1939.

Q. Since 1939?

A. Yes.

Q. What is the principal business of the company?

A. We manufacture starting and lighting batteries, automobile batteries.

Q. Were you connected with the battery business prior to the time you went with the Universal?

A. Yes.

Q. Over how long a period of time?

A. Since 1922.

Q. Since 1922?

A. That is right.

Q. And have you been production manager and

1702 vice president since 1939, of Universal?

A. Since 1939.

Q. I see. From what sources does Universal purchase lead oxides?

A. At the present time and in the past, since 1939, to my knowledge, National Lead Company.

Q. You do not know who they purchased it from prior to that time?

A. We have purchased some oxides from, or we have purchased some oxides from Hammond Lead Company in Hammond, Indiana.

Mr. DuBose: Is that since 1939?

The Witness: Yes.

By Mr. Wright:

Q. Have you purchased from Metals Refining Company?

A. Not since 1939.

Q. Or Eagle-Picher Lead Company?

A. No.

Q. On what price basis do you purchase oxides from the National Lead Company?

A. We purchased oxides at $1.50 over the published lead price.

Q. What lead price is that, do you know?

A. New York.

Q. New York lead price?

1703 A. Yes.

Q. Do you also purchase antimonial lead?

A. Yes.

Q. Is that used in the production of storage batteries?

A. Yes.

Q. From whom do you purchase that?

A. National Lead Company.

Q. On what price basis do you purchase that?

A. The cost of metals.

Q. Will you explain that answer?

A. We purchase pig lead in the form of antimonial pig lead. In other words, the price of lead, plus the cost of antimonial pig lead, pardon me, plus the cost of antimony.

Q. I see. Well now, what pig lead price is that that you purchase on?

A. Generally, St. Louis.

Q. St. Louis lead price?

A. That is right. St. Louis lead price.

Q. And that is delivered to you here in Chicago?

A. Yes.

Q. On that price?

A. Yes.

Q. What is the normal average annual output of the batteries by Universal?

A. The annual?

Q. Yes.

1704 A. Approximately about 200,000.

Q. That is 200,000 batteries per year?

A. Yes.

Q. Over what market area does Universal sell those batteries?

A. About a radius of 500 miles.

Q. Of Chicago?

A. Yes.

Q. How far west do you go?

Mr. Welch: May I ask a question? Is the gentleman who just came in the room a witness?

Mr. Wright: Excuse me.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. How far west do you go?

A. Approximately 250 miles.

Q. Do you go as far as the Twin Cities?

A. No, we do not.

Q. Well, at what points do you sell, in 250 miles or less?

A. Well, we go as far as points in Nebraska.

Q. Yes. Do you sell in Kansas City?

A. No, we do not get into Kansas City.

Q. St. Louis?

1705 A. St. Louis.

Q. How far south do you go?

A. We go as far as Indianapolis, and as far as Cleveland. We have shipped batteries into Buffalo.

Q. Do you have travel salesmen in those territories?

A. We travel, yes, we have had travel salesmen. At the present time we do not travel salesmen.

Q. Prior to 1941, did you travel salesmen?

A. We did.

Q. In those areas?

A. Yes.

Q. Soliciting business?

A. That is right.

Q. What types of accounts do you solicit in those areas?

A. Jobbers.

Q. That is for resale?

A. That is automotive jobbers that sells to a dealer.

Q. I see. Where is the substantial bulk of your distribution?

A. Well, the substantial bulk is in I would say, within 50 miles of the Chicago area.

Q. What brands do you sell; what trade names do you sell your batteries under?

A. We have the Universal trade name, and then we have a considerable amount of private brand business.

1706 Q. For what companies do you supply private brand batteries?

A. We supply batteries to the Gebhardt Stores in Decatur, Illinois; Western Tire and Supply, in Chicago; Goldblatt Brothers, in Chicago, Blue Star Stores in Chicago.

Q. Are those all retailers principally?

A. They are all chain stores.

Q. Chain retail stores?

A. Yes.

Q. And do you make these batteries under their private brand?

A. Under their private name, under their own name.

Q. I see. Over this market area that you have described, do you compete with a National Battery Company?

A. Yes.

Q. With Willard and Exide?

A. Willard, Exide, all.

Mr. Du Bose: If your Honor please, I make the same objection as we made to the other witnesses testimony along this line.

In other words, it is irrelevant. I made an objection on the grounds that this testimony about competition among battery manufacturers, is purely irrelevant to this proceeding.

Trial Examiner Norwood: Well, I think it is very 1707 clear that these particulars as to this trade here may be shown in bearing on effects.

Mr. Wright: I think it is obvious, the relevancy of this information, to this proceeding.

Mr. Du Bose: There is nothing in the complaint so far as I know. Of course, the complaint started out with white lead and was amended to include lead pigments. There is not a word, as I remember, about battery manufacturers.

Mr. Wright: Well, I think that it is obvious, when we speak of oxides in connection with the battery, storage battery business, that we are mentioning litharge, and litharge and red lead combined, which are certainly within the category of lead pigments as stated in the complaint.

Mr. Du Bose: I will grant you, but there is nothing in the complaint about the competitive situation in batteries.

Mr. Wright: No, but the complaint alleges the competitive effects of the respondent on secondary lines.

Mr. Du Bose: In other words, this testimony then is directed to Count 2 of the amended complaint solely.

Mr. Wright: No. I am not going to make such a restriction as directed solely to Count 2.

Mr. Du Bose: That would be the only relevancy.

Trial Examiner Norwood: I think gentlemen, 1708 clearly, it is admissible.

Mr. Wood: Well, I think we should have some sort of a statement from counsel at least as to the position of the Federal Trade Commission, because I think the bill of complaint is absolutely void of any specific allegations as to the effect of the practices complained of in the battery industry.

I will agree, if counsel will just help us with the statement, what it is all about, it may be admissible, but that complaint is very general.

Trial Examiner Norwood: I think it is sufficiently broad to include this information now offered.

Mr. Wright: This information which is now offered is squarely within subparagraph two.

Mr. Du Bose: Of Count 2.

Mr. Wright: Of Count 2, but I am certainly not going to exceed any restriction that this testimony applies only to that paragraph.

Mr. DuBose: Then I move, if your Honor please—

Trial Examiner Norwood: Let me rule on the objection. The objection is overruled.

Mr. Du Bose: I object insofar as any of this is relevant, that any of this testimony relates to Count 1 of

the amended complaint and move to strike it so far as it may be related under Count 1 of the amended complaint.

Trial Examiner Norwood: Objection overruled.

1709 Proceed.

By Mr. Wright:

Q. You stated in your last answer, I believe, that you did compete with the National Battery Company, or over it?

A. We compete with all manufacturers of storage batteries within the vicinity of the ground we cover.

Q. Well now, are there also competitors in the grounds that you cover who ship in from outside which are not located within this area?

A. Oh yes.

Q. Who are those competitors; do you recall them by name?

A. Exide Storage Battery for one; Willard in Cleveland; they ship in here.

Q. How about Grant?

A. Grant, Minneapolis ship in here. Grant is Willard at the present time. It is under a different name.

Q. How about Bowers and Reading?

A. Bowers shipped into the Chicago area.

Q. Are you also in competition with the very small battery manufacturers?

A. Oh yes.

Q. In this area?

A. Oh yes.

Q. Do you know whether there is any considerable number of them located here?

1710 A. There is a considerable number over an area, a radius of 300 miles.

Q. Do you encounter Monarch in your trading area?

A. Monarch.

Q. And do you encounter competition from Sears Roebuck?

Mr. DuBose: I object to this as being purely cumulative and irrelevant. The witness has stated that he is in competition with all battery manufacturers within this area. Now, I do not see the purpose in naming particular manufacturers.

Mr. Wright: It is not established that Sears Roebuck is a battery manufacturer at the present time.

Trial Examiner Norwood: Objection overruled.

Mr. Welch: I have another objection. The witness has stated that he sells to jobbers and Sears Roebuck sales, I think we can take general judicial notice, that their sales are at retail, so certainly Sears Roebuck would not be competitive with this man's company.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. I believe the last question related to whether or not you competed with Sears Roebuck in the area?

A. Well, we do not sell retail. We only sell wholesale, and I do not think Sears Roebuck sell wholesale.

Q. Do the prices and practices of the Sears Roe-
1711 buck Company in that area affect your relations with your jobbers?

Mr. DuBose: Objection.

Mr. Welch: Objection, as there is no showing of any knowledge of what their practices were.

Mr. Wright: Well, that is inherent in the question.

Trial Examiner Norwood: Objection overruled. He may answer. He may bring that out.

The Witness: Do you want me to answer that question?

Trial Examiner Norwood: Yes.

Mr. Wright: Yes.

The Witness: Can I get the question.

Mr. Wright: Read the question.

(The reporter read the question as follows:

"Q. Do the prices and practices of the Sears Roebuck Company in that area affect your relations with your jobbers?")

Mr. DuBose: Your Honor, I cannot, for the life of me, see where that is relevant in this proceeding. The prices and practices.

Trial Examiner Norwood: I think he may show how this competition touches, whether there is any competition between this business and Sears Roebuck and just what is the nature of that competition.

1712 Mr. DuBose: Suppose there is; what has that got to do with our complaint?

Mr. Wright: Well, your Honor, the sole purpose of calling, my purpose in calling these witnesses is to show a competitive picture in the storage battery industry, and I think that there is already information in the record

which sufficiently ties up these respondents with that industry, so that that is relevant.

Mr. DuBose: Well, just what the prices and practices of Sears Roebuck has to do under the amended complaint, escapes me for the moment.

Trial Examiner Norwood: Well, the objection is overruled. Answer the question.

A. Sears Roebuck and there are others, possibly, in the same category of Sears Roebuck, have very—are very competitive.

By Mr. Wright:

Q. What, how do you mean "competitive"—in prices?

A. Prices. You don't necessarily have to point out Sears Roebuck. There are others just as competitive as Sears Roebuck.

Q. You mean by that very low prices?

A. Very low.

Q. At retail?

A. Yes.

1713 Trial Examiner Norwood: Well now, how does that affect your business?

The Witness: Well, I don't just quite know how to answer it. You mean, as to competitive, we might compete with, is that you have in mind?

Trial Examiner Norwood: How do you feel the effects of that competition; that competition is with retailers, is it not?

The Witness: Well, the competition is very severe at times.

Trial Examiner Norwood: I know.

Mr. Wright: What—

Trial Examiner Norwood: I understand you sell to jobbers?

The Witness: Yes.

Trial Examiner Norwood: How does this competition in the retail trade affect you; how does it get to you?

The Witness: There are times that Sears Roebuck sells for less than we sell the jobbers.

By Mr. Wright:

Q. What products are you referring to now?

A. Storage batteries.

Q. What particular battery do you have in mind?

A. Your automobile batteries.

Q. Is that standard 15 plate three steel?

1714 A. Yes.

Q. Mr. Arnst, are you familiar, I believe you stated you were production manager. Are you familiar with your material costs and labor costs involved in the production of storage batteries?

A. Yes, fairly well. It depends upon the price of material you are working with. I have varied schedules of the different prices of materials.

Q. Yes. Now, during the 1941 period, can you state the material cost now, just the cost of materials, of a group one, fifteen plate, three seal, hundred ampere hour storage battery?

A. Well—

Mr. DuBose: Excluding labor cost?

Mr. Wright: Yes.

Mr. Wood: One hundred ampere hour or—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

A. Well, I haven't that information right at hand.

By Mr. Wright:

Q. Well, do you have it at hand for the present time?

A. Not the material cost alone. I have—

Q. Do you have it with labor figured in?

A. I have it with my labor figured in. I can give you production and material cost.

1715 Q. Well, as definite as you can, will you give us the production cost and then specify what goes into that, if you can?

Mr. DuBose: What period, Mr. Wright?

Mr. Wright: Well, I am trying to find out what period he has in mind.

A. Well, the present time—

Mr. DuBose: Well, the question was two periods and I want to identify—

Trial Examiner Norwood: Well, I think he will straighten that out.

A. Well, the present period?

By Mr. Wright:

Q. Yes.

A. Well, we will take ampere hour battery, that is the socalled 15 plate hundred ampere hour battery: The en-

tire cost of that battery as far as our factory is concerned will run around $4.05.

Q. Now, does that include your factory cost?

A. That includes factory overhead, direct labor, material cost.

Q. That does not include any shipping costs?

A. No, it does not include shipping costs.

Q. Sales costs?

A. No sales costs, no administrative costs.

1716 Q. No overhead?

A. No. Factory overhead only.

Q. I see. How does that compare with your factory cost in 1941, on that same product?

A. That factory cost in 1941, that factory cost was approximately about $3.20.

Q. What was your selling price to jobbers on that product in 1941, do you recall that?

A. I have that here.

Q. Will you state it please?

A. (Referring to list.) The selling price to jobbers, was $5.30.

Q. That was the battery that cost you, what was it?

A. $3.20.

Q. That is your factory cost?

A. Yes.

Q. So that then your administrative overhead and sales, shipping and taxes, and profit, came out of the difference between those two figures?

A. Yes.

Q. In 1941, did you make a battery which sold at a cheaper price to jobbers than that?

A. Oh yes.

Q. What was the cheapest battery you made at that time, selling price?

1717 A. $3.15.

Q. That was the selling price?

A. Yes, to the jobber.

Q. What was your factory cost on that battery, do you recall?

A. Well, the factory cost does not vary too much on any type of a battery. In other words, let me explain it in this way: You manufacture plates, and you still have the box and covers and the parts, and everything in the battery outside of the actual lead contents in there. The only—the lead content is the only difference in the battery.

Q. How would those very as to lead content? How much lead would be in that cheaper—

A. I would say in the ampere hour battery, there would be approximately 23 pounds of lead. In the cheaper battery it would be possibly as low as 17 pounds.

Q. How would those vary as to lead content? How much lead would be in that cheaper—

A. What?

Q. What would it be; a third, a quarter, a half?

A. The oxide in my factory is approximately 42 per cent of the lead content.

Q. So that in that hundred ampere hour, it would be 42 per cent of 23 pounds?

1718 A. That is right.

Q. Now, on this battery you stated that you sold for $3.15, your factory cost would be as much as your selling price?

Mr. Welch: Objection.

Trial Examiner Norwood: Sustained.

By Mr. Wright:

Q. Did I understand your answer to be with reference to my question about the cost of that cheaper battery, that it would cost approximately as much as—

A. A little less.

Q. A little less?

A. Yes.

Q. How much?

A. Not in proportion to, not in proportion in the two prices.

Q. Now, the hundred ampere hour battery, cost you $3.25; was that your answer?

A. Yes.

Q. So that the cost of the cheaper battery would be a few cents less?

A. About two dollars—

Mr. Welch: Objection, your Honor. I think he should ask him what the price was, the cost of his cheaper battery.

Mr. Wright: Well, he has stated—

Mr. Welch: We are going all the way around the

1719 barn to—

Trial Examiner Norwood: He is simply recapitulating and asking him something about what he has testified to.

Mr. Welch: The witness has not testified about what it, what the cost was, and he had showed a readiness and ability to testify to every other item.

Mr. Wright: I believe the witness has answered the question in two or three ways.

Mr. Welch: Except the straight way.

Trial Examiner Norwood: Well, I think it would be the safe thing not to lead the witness.

By Mr. Wright:

Q. Do you know what the cost would be of the cheaper battery to which you refer?

A. I haven't the exact figures. I can give you an approximate cost.

Q. What is the approximate cost?

A. The approximate cost on that battery would be approximately about $2.60.

Q. $2.60?

A. Yes.

Mr. DuBose: Just to keep the record straight, are we talking about 1941?

The Witness: Yes.

1720 Mr. Wright: Yes.

By Mr. Wright:

Q. Now, what size battery is that that you are referring to?

A. That was a sixty ampere hour battery.

Q. How many plates did it have?

A. Thirteen plates.

Mr. Wood: Excuse me a bit. I am confused; that is the price of the whole battery and the price of the lead oxide that goes—

The Witness: The whole—

Mr. Wood: The cost, not the price?

The Witness: That is right.

By Mr. Wright:

Q. What was your margin of profit on that sixty ampere battery?

A. I worked on a very small margin of profit, on that.

Q. How many different types of batteries did you produce in 1941, do you recall offhand?

A. In the particular group, for instance, the group one, or the whole line?

Q. The whole line?

Mr. Wood: I would like to ask that the question and answer, as to what was the margin of profit and the reply, of a very small margin of profit, I would like to
1721 move that that be stricken unless the margin of profit is stated, simply and succinctly.

Trial Examiner Norwood: I would say he may—

Mr. Wright: I would be glad to have the witness amplify that answer but I think it can stand in the record the way it is.

Mr. Wood: That is the type of thing the Court of Appeals likes to say, it is a thing in which the profits are small; how much are we to say? The witness stating it is small is simply a conclusion.

Mr. Wright: We are going further into this question Mr. Wood. I am not going to let that—

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. What was your margin of profit on that sixty ampere battery?"

"A. I worked on a very small margin of profit, on that.")

Mr. Wood: That is the answer I object to.

Mr. DuBose: It is not responsive.

Mr. Wood: It is a conclusion.

Mr. DuBose: The direct question: "What was your margin of profit—

Trial Examiner Norwood: I think he can give it
1722 to us, if he can.

Mr. DuBose: Is the answer stricken?

Trial Examiner Norwood: I have no objection to his comparing that, with using comparative terms, with respect to two different profits on two different numbers. He might do that, but I will sustain the objection and let the counsel—

Mr. DuBose: Is the answer stricken. I move to strike the answer.

Trial Examiner Norwood: Motion is allowed.

By Mr. Wright:

Q. Mr. Arnst, I understand you to state the approximate cost of sixty ampere hour battery was two dollars and sixty some cents?

A. Approximate, yes.

Q. And the selling price was three dollars and—

A. Three dollars and fifteen cents.
Q. $3.15?
A. Yes.
Q. Do you know what the sales and shipping costs were during that period?
A. I do not have those figures at hand.
Q. You stated that you did business within a radius of 500 miles of Chicago?
A. Yes.
Q. Do you ship those batteries by rail?
1723 A. Mostly by truck.
Q. Mostly by truck?
A. Yes.
Q. Do you recall the freight, the truck freight rate on batteries from here to Cleveland?
A. I know the truck rate rates from here to St. Louis.
Q. What were they?
A. Twenty-five cents a hundred at that time.
Q. What?
A. Twenty-five cents a hundred at that time.
Q. And a battery weighs on an average how much?
A. From 30 to 40 pounds, depending upon the battery itself.
Q. I see. Do you know what the average shipping cost was in that period?
Mr. DuBose: Over what period?
Mr. Wright: We are speaking of the 1941 period.
Mr. DuBose: Over what area?
Mr. Wright: Over the entire area.
Mr. DuBose: You mean the average?
Mr. Wright: Off the record.
Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Trial Examiner Norwood: On the record.
Mr. DuBose: I object to the question as being indefinite.
1724 Trial Examiner Norwood: Had you finished the question?
Mr. Wright: I had finished the question. The question was: Can you state what the shipping charges were on the average during that period, and that period we were referring to is 1941. It is the year 1941.
Mr. DuBose: I object on the ground that the question is too indefinite.

It is too inconclusive and it does not specify whether it is the average freight of all his products or what area it covers or anything else and therefore the answer would not be worth anything in this record.

Mr. Wright: Your Honor, I asked for a general average.

Mr. Welch: We have been dealing with specific prices, specific batteries, and they have very substantial variations in the margins and I cannot see how an average freight cost, irrespective of the type of battery involved and the quantities that the item would be chargeable to—it is such a variable factor, that I do not think an average has any weight at all.

Mr. Wright: Well, the whole thing has been on an average basis. Certainly no one particular battery has the same cost characteristics of any other battery, and the only way we can get this information is on a general basis.

1725 Mr. Welch: Further than that, the witness has not shown any knowledge of the freight charges. He is production manager—

Mr. Wright: He is vice president of the corporation too.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Do you know what the average shipping cost was in that period?")

Trial Examiner Norwood: I think a little more definite information would be more satisfactory.

Mr. Wright: Well, your Honor, he is the vice president of the company. He is obviously familiar with—at least, we are trying to ascertain how familiar he is with these things. If it develops that the information he has got is not satisfactory or competent, why certainly I will be the first to be willing to entertain the motion to strike it.

Trial Examiner Norwood: Do you want the average shipping price per battery there?

Mr. Wright: Your Honor, an objection was sustained to the answer that was given to the question regarding the margin of profit on this battery because it was so general. Now, the only way the margin of profit can possibly be determined now, is by taking out of the difference be-

1726 tween the cost, the factory cost, and the selling price, the various items which go in there.

Now, I am trying to find out the average shipping cost on his batteries. If we can't have general statements as—

Trial Examiner Norwood: Well, have you got an average price there?

Mr. Wright: He has given what the specific and definite cost is. Now we are trying to determine, since the objection was sustained to a general statement on his margin of profit on that battery, we have got to ascertain by this backwards method, what that margin might have been.

Mr. Welch: Your Honor, I think there is a short way to get this: Ask the witness to answer the question specifically that he was asked some 15 minutes ago.

Trial Examiner Norwood: What was that?

Mr. Welch: That is the question of what his margin was. Then break down on all these other factors and averages, and the other does not make any difference. We simply want to know what the margin was.

Trial Examiner Norwood: I think counsel is correct.

Mr. Wood: My objection to the question did not go to that. I am perfectly willing for the witness to state what his percentage, what his margin of profit was. It was his indefinite answer that I objected to.

1727 By Mr. Wright:

Q. Do you know what your margin of profit was on that battery in 1941?

A. We did not have a definite margin. We worked as low as ten per cent.

Q. Is that ten per cent of the selling price or ten per cent of your cost?

A. Ten per cent of our cost.

Q. Of your factory cost?

A. Yes.

Q. Would that represent your margin of profit on that particular battery?

A. What would represent it?

Q. That would represent the margin of profit, would it?

A. Yes.

Mr. Wood: All right.

By Mr. Wright:

Q. You stated that you were in competition with a large number of the battery companies over your market area?

A. Yes.

Q. Was there, from the period from 1939 to 1941, price competition in that area?

Mr. DuBose: I object to the question upon the grounds that it is too general. It does not specify—what industry.

1728 Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Were batteries sold by your competitors in that period, 1939 to 1941, in that market area, at prices lower than those which you offered on a comparable battery, comparable batteries?

A. Yes, there was prices lower than ours, and we were lower than some others.

Q. Did you at that time enjoy a margin of profit as large as that which you now have?

Mr. DuBose: I object to that on the grounds that it is purely irrelevant.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: And incompetent.

Trial Examiner Norwood: Overruled.

Mr. Wood: I object, your Honor, to the general employment of terms such as "enjoy" and "suffer." That is not necessary. They made profit or they lost money. Enjoy and suffer are not proper words in a question directed to this whole subject matter.

Trial Examiner Norwood: I think the meaning of those words are very clear.

Mr. Wood: Well, I think there is a little overtone that is completely unnecessary.

Trial Examiner Norwood: Objection overruled.

1729 The Witness: Do you want me to answer that?

Mr. Wright: Yes.

A. In 1939, we made a profit.

By Mr. Wright:

Q. What—your profit at that time, how did your profit at that time compare to your present profit rate?

Mr. Welch: Objection, your Honor. There isn't anything to show in the record at this time that any change in the profit, either up or down from 1939 to now, is attributable to any of the practices of these respondents.

Trial Examiner Norwood: Isn't he attempting to cure that by this question?

Mr. Welch: I do not think so, your Honor. I do not think this has anything to do with it.

Let him ask if these people to whom these practices are charged, how that has changed his profit picture in that period of time.

Trial Examiner Norwood: Let him answer. Objection overruled.

Answer the question. Do you want the question read?

The Witness: Please.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. How did your profit at that time compare 1730 to your present profit rate?")

A. Our profit in 1939 in, compared to today's profit was a little smaller than it was today. Now, on account of possibly we have to increase production today over 1939, might have something to do with increased profit today.

By Mr. Wright:

Q. I believe you stated Mr. Arnst, that you figured on that sixty ampere hour battery, that it cost you somewhere in the neighborhood of $2.60, that you made ten per cent?

A. Yes.

Q. You figured to make ten per cent?

A. Yes.

Q. Profit?

A. Yes.

Q. Did you always make your ten per cent profit on costs on that battery during the period from 1939 to 1941?

Mr. DuBose: I object.

Mr. Welch: Your Honor, he has already answered that question by saying they made down to ten per cent.

Mr. Wright: No, I do not believe that is what the witness answered to that question.

Mr. Welch: I think if you read the question you will find—

Trial Examiner Norwood: I will overrule the objection and let him elucidate.

1931 A. Well, the batteries we sold, we made ten per cent on them.

Mr. Wright: I see.

Trial Examiner Norwood: Did you enjoy that?

By Mr. Wright:

Q. During the period from 1939 to 1941, was the battery business in your area highly competitive as to prices?

A. Well, the battery business has always been competitive as far back to my knowledge, as I can remember.

Q. I see. Now, would a savings to you of five to ten cents per battery on your cost of materials going into the production of those batteries, affect your ability to compete in that market area in normal competitive times?

A. I think—

Mr. DuBose: I object on the same ground that we objected to a similar line of questioning. The witnesses in St. Louis on July 29 and 30, 1946, were asked similar questions as to white, dry lead, and I think we made a series of objections on the grounds of irrelevancy, and incompetent and immaterial, and on the further grounds, some of which I cannot remember.

Mr. Wood: And I will add, that it is leading.

Trial Examiner Norwood: What was my ruling?

Mr. DuBose: You overruled them.

Mr. Wood: My objection to the question is to its 1732 leading form.

I have no objection to the general substance being brought in in the proper way but it is very leading.

Trial Examiner Norwood: It did not impress me as being leading.

Read the question.

The reporter read the question:

"Q. Now, would a savings to you of five to ten cents per battery on your cost of materials going into the production of those batteries, affect your ability to compete in that market area in normal competitive times?")

Trial Examiner Norwood: Objection overruled. Answer the question.

Mr. Wright: I believe the question is answered.

Mr. DuBose: No, he has not.

A. Most certainly it would help us meet cheaper competition.

By Mr. Wright:

Q When you say cheaper competition, whom do you mean by that?

A. Well, the competition that has been bothering us in the territory that we have not been able to compete with.

Q. What concerns do you mean when you say that?

A. It would possibly help our dealers compete with the large chain stores there that have to pay the same

1733 price that large chain-stores are retailing the batteries at.

Q. Well, now, do you know who makes the batteries in this competition you referred to?

A. There is two large companies.

Q. What companies?

A. National Battery and Globe Union.

Q. Well, would Willard or Exide or Grant be in that category?

A. Up to recently Exide and Grant have never been too severe competition.

Q. They have not made the cheaper batteries?

A. They have not.

Q. They have been in competition with you nevertheless in those areas?

A. They have been in competition.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: We will take a five minute recess.

(Short recess.)

Trial Examiner Norwood: On the record.

Mr. Wright: I would like to ask one question before submitting for cross.

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. Mr. Arnst, did you receive a subpoena requir-

1734 ing your attendance at this hearing?

A. I did.

Q. Did you discuss being a witness at a hearing in this matter with anyone prior to receiving that subpoena?

A. No.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. DuBose.

Q. Now, Mr. Arnst, I notice on direct examination you referred to some written matter that you brought out of your pocket; were those your office records?

A. Those are printed price lists.

Q. Your printed price lists?

A. Yes, that I dug out of the files.

Q. That does not contain the battery costs?

A. No.
Q. Breakdowns?
A. No, just the selling prices.
Q. Now, Mr. Arnst, from whom does Universal Battery Company receive the largest competition in the battery field?
A. Who do we receive the largest competition from?
Q. Yes, who are your chief competitors?
A. Do you want to specify names?
1735 Q. Yes, and where located.
A. Well, we receive our greatest competition from National Battery Company.
Q. Where are they located?
A. They have plants in various parts of the country, particularly in Chicago Heights.
Q. Chicago Heights?
A. Yes.
Q. Do you receive large competition from Willard Battery Company?
A. Willard is in competition with us but they are clean competition.
Q. They are competitors of yours?
A. Yes.
Q. Where are they located?
A. Their plant is in Cleveland, Ohio.
Q. And did you say, did you also receive competition from Grant?
A. Also from Grant.
Q. And where are they located?
A. They are in Minneapolis, I think.
Q. And how far is that from Chicago?
A. About 320 miles.
Q. How far is Cleveland from Chicago?
A. About 320 miles.

1736 By Mr. Wood:

Q. Are you familiar with the Eagle-Picher battery oxides?
A. Yes.
Q. Have you experimented with them?
A. Yes.
Q. Why don't you use any of them?
A. Why don't I use Eagle-Picher?
Q. Yes.

A. Because I think National Lead is superior to Eagle-Picher.

Q. You do?

A. Yes.

Mr. Wood: That is all.

Trial Examiner Norwood: Anything further?

By Mr. DuBose:

Q. Do you get technical advice from National Leads?

A. I do.

Q. And do you believe that their service and their oxides are better than other oxides?

A. That is right. I wouldn't be using National Lead—

Mr. Wood: One more question:

By Mr. Wood:

Q. Do you recognize, don't you, that the opinion, your opinion as expressed that National Lead oxides, is superior to Eagle-Picher oxides, is a controversial matter, and
1737 that other people have different opinions on it?

A. That is my opinion.

Q. But you recognized there are different opinions on that question?

A. I know people prefer Eagle-Picher to—

Mr. Wood: That is all.

Trial Examiner Norwood: Do you pay them more, the National more, for its commodity which you consider superior?

The Witness: I would not know Eagle-Picher's prices.

Redirect Examination by Mr. Wright.

Q. Mr. Arnst, what are the differences, for instance, in negative oxide that cause you to prefer those of the National over Eagle-Picher?

A. The reason I prefer National's oxides, they are, in my opinion and from various tests that I have made in my own laboratory, that National Lead has a far superior negative oxide, and cold test—

Q. Cold tests?

A. Yes.

Q. What is the cold test?

A. For the ability of a battery to start under cold temperatures.

Q. In other words, your testimony refers not to
1738 the difference between the two oxides, but between two batteries made from—

A. From National Lead and Eagle-Picher.

Q. You mentioned your laboratory, that you made chemical examinations of these two oxides?

A. Merely testing the batteries themselves.

Q. You have made no chemical analysis to determine whether there is any difference organically, in the two products?

A. I am not interested in that. What I am primarily interested in is in the results of the battery after the battery is built.

Q. Yes. Then it is not as a physical comparison between the two oxides. It is just your opinion that the oxides that National produce is a better product than Eagle-Picher produces?

A. Over a period of years of practical experience, that has been my experience.

Q. Do you know, if you wanted to use Eagle-Picher's oxides, whether you could procure them through the National Lead Company?

Mr. DuBose: I object to that.

It is a leading question and has nothing to do with this proceeding. It is irrelevant.

Trial Examiner Norwood: I think the question is leading.

1739 Mr. Wright: Your Honor, I was just asking him if he had that knowledge.

Trial Examiner Norwood: Read the question.

Mr. DuBose: I don't think it makes any difference what knowledge he has.

(The reporter read the question:

"Q. Do you know, if you wanted to use Eagle-Picher oxides, whether you could procure them through the National Lead Company?")

Mr. DuBose: I do not see its relevancy, if your Honor please. It does not make any difference one way or the other.

Mr. Wright: Well, it has already been established that—

Trial Examiner Norwood: Well, there are evidences here comparing the two and I do not see clearly its relevancy either, to tell you the truth.

Mr. Wright: Well, I think the answer to that question will become relevant later and I wish to request that it be admissible at this time, subject to further connection.

Trial Examiner Norwood: He may answer. Objection overruled.

A. No, I do not buy Eagle-Picher oxides through National Lead Company.

By Mr. Wright:

1740 Q. So far as you know?

A. That is right.

Mr. Wright: No further examination.

Mr. Wood: I would like to add just one more question.

Recross Examination by Mr. Wood.

Q. You recognize, don't you, Mr. Arnst, that the lead oxides offered by National and Eagle-Picher, for use in batteries are different, that is sufficiently different, to require you to run a comparative test, and experiments on them?

A. Well yes, they are considerably different.

Mr. Wood: That is all.

Redirect Examination (continued) by Mr. Wright.

Q. What are those differences, Mr. Arnst?

A. From a factory man, and a man that is in the production, the quality of the battery is very much superior with the battery of the National Lead oxides, as Eagle-Picher's oxides.

Q. In other words, you did not mean then that there were any physical differences between the two products, so far as you know?

A. That I don't know.

1741 Mr. Wright: No further questions.

Mr. Wood: Just a minute. I want that clear. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Recross Examination (continued) by Mr. Wood.

Q. Mr. Arnst, between the National and the Eagle-Picher oxides, do you recognize from the point of view of a battery manufacturer that there are physical and or chemical differences between the two products?

A. Oh yes, there are chemical differences.

Q. Well, on what do you base your answer?

A. I base my answer that there must be the difference of chemical differences on account of the results I get in the battery.

Redirect Examination (continued), by Mr. Wright.

Q. But you do not yourself know of any physical or chemical difference between the two products?

A. It is evidently a trade secret.

Q. Do you know of any physical differences between the two?

A. I don't think National publishes the differences.

1742 Trial Examiner Norwood: He asked you as to your knowledge; do you know it or do you not?

The Witness: No, I do not know of any physical differences.

Mr. Wright: No further examination.

Recross Examination (continued) by Mr. Hinds.

Q. I think I heard you say that Willard gives clean competition. What did you mean by that? Do you mean to imply that some of the others gave a different kind of competition from clean?

A. Selling possibly below cost.

Q. Do you mean that some of the others sell below cost and Willard makes a profit on its sales?

A. I think, that is my impression, that I have received, out in the territory.

By Mr. DuBose:

Q. You mean, in other words, sometimes in the battery business some manufacturers sell on a so-called "loss leader"?

A. That is right.

Trial Examiner Norwood: Anything further?

Mr. Wright: Nothing further.

Mr. Hinds: If your Honor please, I move to strike out the entire testimony of this witness and of the previ-
1743 ous witness, in that it cannot be brought at all within the pleadings under either the first count or second count, which deals with lead pigments.

As I understand the term pigment, it does not refer to the physical or chemical nature of the substance. The identical lead oxide, when used for some purpose other than a pigment is no longer a pigment. It is not a pigment.

The whole contents of these pleadings show that they are referring to pigments in the true sense of the word, as an ingredient used in paint or coloring. All the context shows that.

There are frequent references and I have marked them here, if you care to hear it, showing in every case that they are referring to pigments in the accurate meaning, and the only meaning that I know it can be given, is a substance used for coloring.

Now, I might say, for example, the word lubricant; suppose an oil can be used as a food, like salad oil, and it can also be used as a lubricant, and it is not a liquid when it is used as a salad oil, and when you put lead in the batteries, they are lead pigments, and hence not within the subject matter of this complaint, even though they may be chemically and physically the same, and even though they may be produced and sold by the same process and companies.

Mr. Wright: Well, in answer to that, your Honor,
1744 the expression of lead pigments, that appears and is defined in sub-section five of paragraph four of the complaint was drawn to include all of these various products; litharge, and red lead and the others, and the adoption of the language there is the same which is the industry usage.

Now, in the lead industry—

Mr. Hinds: Are you testifying or arguing?

Mr. Wright: I am answering your objection.

Mr. Hinds: You are giving testimony. I am giving legal argument.

Mr. Wright: I am making statements about what already appears in the record, I believe.

Trial Examiner Norwood: I think—

Mr. Wright: Exhibit 509, which is the copy of the Code of Fair Competition for the lead industry—

Mr. DuBose: 809.

Mr. Wright: —uses the term lead pigments covering all those industry products and certainly that was the usage from all the documents from the lead industries association produced under subpoena.

It shows litharge and red lead pigments. The respondents brought in, in response to the subpoenas, on litharge and red lead invoices and other documents relating to what are also called lead oxides, which to me, is a sub-classification of the general classification of lead pigments.

1745 Mr. Hinds: Well now, if your Honor please, he certainly cannot—

Trial Examiner Norwood: Are you through?

Mr. Wright: Yes.

Mr. Hinds: He cannot extract from us admission as to the meaning of the term that has a question of universal meaning by showing that in response to a subpoena, which subpoena might have called for entire irrelevant, immaterial matters, we obeyed the subpoena. The subpoenas referred to oxides. We had to bring in the material on those oxides, whether they were used as pigments or not.

Trial Examiner Norwood: Well, I think the contentions are very clear now on each side.

Mr. Wright: Mr. Marson and Ozler testified that these various green oxides, perox and zerox and other things in the sub-classification battery oxides, were litharge, or litharge and red lead combinations, and that was in substance what they were.

Mr. Hinds: The physical nature—there are no pigments. An oil is a lubricant, but if it is not used as a lubricant is not a lubricant.

Trial Examiner Norwood: Does counsel contend that the effects in the trade of the sale of lead derivatives applied to any other use than that of paint would not be covered in this complaint, is that right?

1746 Mr. Hinds: That is right.

Trial Examiner Norwood: Is that a clear statement?

Mr. Hinds: That is right. Even if it is the same chemically, if it is not used as a pigment, it is not a pigment, any more than oil not used as a lubricant is not a lubricant. You use sugar in glue, but it is not a sweetening.

Mr. Wright: In paragraph five of the complaint on page three, after delineating the uses of these products, as pigments, in other words, as a component of paint, or as paint,

it then states that such pigments have other important commercial uses too numerous to mention.

Mr. Hinds: That can be construed under the Latin maxim of ejusdem generis. You have to read that in the sense of other uses of the same general type, for example, as being used in varnishes or in lacquers, or enamels. That does not mean it refers to those same substances that were used in some remotely different thing like batteries.

1747 Mr. Wood: If Your Honor please, as I interpret the Robinson-Patman Act it refers entirely to conduct that upsets the competition among customers primarily, and I think the whole complaint, that is Count II of it, is directed to the charge that these companies have upset the normal competition in the paint industry, that is in the pigment industry, and there is no reference to the battery industry whatsoever.

Trial Examiner Norwood: I shall deny the motions to strike the evidence, and counsel may renew such motions at the close of the evidence, and probably the Commission will hear them on that.

The witness is excused.

(Witness excused).

Trial Examiner Norwood: Off the record.

(Discussion off the record).

Trial Examiner Norwood: On the record. We will recess until 2:00 o'clock.

(Whereupon, at 12:10 p.m., a recess was taken until 2:00 p.m., this day.)

1748 Afternoon Session.

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

Call your witness.

Mr. Wright: I want to call Mr. Sweet.

BERNARD SWEET was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name and address, Mr. Sweet?

A. Bernard Sweet, 424 Aldine Avenue, Chicago 13, Illinois.

Q. What is your business occupation, Mr. Sweet?

A. We are manufacturers of automotive storage batteries.

Q. Are you with a company?

A. Yes, sir, the Apex Battery Manufacturing Company here in Chicago.

Q. What is the street address of that company?

A. 4714 West Kinzie Street.

Q. Is that a corporation?

A. No, it is a partnership.

Q. Are you one of the partners?

A. Yes, sir, I am.

1749 Q. For how long a period of time has that company been engaged in business?

A. It will be 10 years, now, under the name of Apex Battery Manufacturing Company for the last 10 years.

Q. How did it operate prior to that time?

A. We were another company, the Commander Battery Manufacturing Company, but we sold that out and went into the Apex Battery Company.

Q. Did you sell the Commander Battery Company to the present Commander Battery Corporation?

A. That is right.

Q. And you say that was about 10 years ago. Would that be in 1936, then?

A. About 1937.
Q. About 1937?
A. Yes, I am pretty sure I am right on that.
Q. What products are made by Apex?
A. Automotive and truck type storage batteries.
Q. Are they replacement type batteries?
A. Yes, sir.
Q. About what is your normal average annual output of batteries?
A. I should say, depending on what we all consider normal, I would say about 35,000 or 40,000—let me correct that. Prior to the war we made about 25,000 batteries
1750 a year. During the war, both for the Government and our own accounts, we ran as high as 42,000 or 45,000, so I would say roughly our normal production would be somewhere between 30,000 to 40,000 a year.
Q. In what market areas do you sell those batteries?
A. The immediate middle west. We have sold as far as, we have shipped our batteries, rather, as far as New Orleans and as far as California, and the State of Washington, but that is on special orders. Most of our business is in the immediate middle west.
Q. Over what territory do you actively solicit business?
A. In Illinois, Indiana, Michigan, Wisconsin, the near side of Ohio, the near side of Missouri, the near side of Iowa.
Q. Would that include Kansas City?
A. No, we don't go as far as that. We have at times, but it is not our regular territory. It is a little too far.
Q. All right.
A. I would put it this way. For a company of our size, about a 300 mile radius would be just about the limit of our shipping area for profitable shipping.
Q. Do you get into Minnesota?
A. Occasionally, but not much; the near part, close to.
Q. Do you sell to dealers for resale?
A. We sell to dealers, and we sell to jobbers, and we sell to distributors, automobile agencies, all those types of people, all for resale purposes, of course.
1751 Q. Do you have any accounts with fleet operators?
A. No, not to my knowledge. Our distributors may have some accounts with fleet operators, but we ourselves haven't.
Q. Under what brands and trade names are your batteries sold?

A. Today we sell nothing but Apex. We formerly, in years gone by when cases were plentiful, had different names, but you just can't get them today so we are using the one.

Q. In the market areas in which you compete, who are your principal competitors among the other battery manufacturers?

A. Well, you mean by name?

Q. Yes, sir.

A. Well, I can state that roughly, and say that all the companies are our competitors, all battery manufacturers in this area are our competitors.

Q. That would include the very large ones and the very small ones?

A. Large and small.

Q. Would that include the National Battery Company?

A. Yes, surely.

Q. And Willard?

A. Willard, Exide, Delco, Auto-Lite, Universal, Solar, all of them in this area, Globe.

Q. How about Grant?

A. Strangely enough, we don't see Grant a lot in our Chicago area, although we do run across their bat-
1752 teries in the outlying towns. I don't know whether they have come into Chicago or not, but we haven't seen them here. We do get into competition with them in such places as Grand Rapids, for example, Milwaukee, Southern Illinois, Peoria, and all through that area.

Q. Are you in competition with Sears Roebuck or Montgomery Ward?

A. Well, that competition would enter, of course, on the retail end of it. As far as wholesale selling, no. Their prices are low on their retail in normal times, so that they sometimes sell to the public, to the consumer, almost as cheaply as we are able to sell our dealers. Their retail price, in other words—

Q. (Interposing.) Is that true of both Sears Roebuck and Montgomery Ward?

A. Yes.

Q. Do you encounter the same sort of competition from Atlas and Firestone?

A. No; I don't know about Atlas, I don't know too much about them, although I know their batteries are made by National Battery Company. But with Firestone, the competition we encounter is not in the retail as much as it

is in the wholesale, but their prices are fair. By the word "fair", I mean they are not too cheap or too high; it is a good competitive fight as to who has got the best product, they will get the order.

1753 Q. Who produces the Sears Roebuck Batteries, if you know?

A. Yes. Well, there are many companies producing batteries for Sears today, but under normal conditions and times it was one exclusive company, the Globe Battery Company.

Q. How about Montgomery Ward?

A. National Battery Company, under normal times, has been their sole source of supply, to our knowledge.

Q. Have you encountered Bowers Battery Company?

A. Yes. Before the war they started a lot of price fighting in this area—"price", not "prize"—which made a lot of trouble, quite a bit of trouble in this area.

Q. What do you mean by "trouble"?

A. They sold batteries so ridiculously cheap that it was actually a loss to meet their competition. We actually had to lose money on one battery and sell another battery at a profit in order to equalize both batteries. In other words, this is a very good example of what the business used to be. It actually involved, out of 100 batteries, approximately 66 batteries sold on a break-even basis before you could make money on the last 33 or 34 batteries.

Q. Was that as a result of this competition that you have been referring to from Bowers and Sears Roebuck?

A. Bowers, Sears, yes. And the major companies—and by the "major" companies I mean the big five—they didn't have batteries that cheap. We ran across

1754 competition from Universal at those prices, Commander Battery. We ourselves, of course, were in the same thing. I am not painting ourselves as a lily. We got into this fight ourselves, we couldn't help ourselves.

Q. You did meet that competition wherever you found it?

A. We had to or otherwise we wouldn't have had any business, although we did not start that.

Q. To what period are you referring now?

A. That would be the 1938-1940 period, about; probably early in 1941.

Q. It held over into 1941?

A. I think it held over quite well into '41. In fact, when

the war first hit us, the first year after the war, it was very bad. There were no batteries, everybody was scared about buying anything for anything, and there was just no business at all.

Q. Mr. Sweet, in a 100 amp.-hour 15-plate, 3-cell battery—do you make that sort of battery?

A. Yes, sir, we do.

Q. How much lead is used in the manufacture of that battery?

A. I will have to give that approximately, because we, like every other battery manufacturer—or at least I think like every other battery manufacturer—have adopted the so-called normal weights, which is more or less standard through the industry, approximately 25 pounds for every type battery we make. In other words, some batteries
1755 might be 23½, some might be 27.

Q. They all are within that range?

A. Yes, sir.

Q. Of that 25 pounds of lead, how much is accounted for by the oxides?

A. You mean in our own company?

Q. Yes, sir.

A. I would say between 10 to 12 pounds.

Q. You referred a moment ago to batteries which you either broke even on or sold at a loss. What specific types of batteries were you referring to there?

A. They were a very cheap battery, made very cheaply, 13-plate battery, is what they were called.

Q. What was their amp.-hour output?

A. Very poor, I can assure you that. I think they were listed at that time—prior to the war we discontinued that altogether—frankly, I looked for that sheet to try to bring it along with me, but I couldn't find one. If I remember, they would run roughly somewhere between 60 to 70 amps., maximum.

Q. Can you state what your material cost of production of that type of battery was in 1941?

A. I can't give it to you correctly, but I can give it to you closely, I believe.

Q. Will you state what you believe it to be, and
1756 then we will find out what you are basing your answer on?

A. All right.

Mr. Welch: Objection on the basis of it being an approximation.

Mr. Wright: Your Honor, I don't know what is in the witness' mind. I believe he should be allowed to answer the question, and if it appears that he is only guessing, the thing is subject to a motion to strike.

Trial Examiner Norwood: Can you give a close approximation?

The Witness: I believe I can.

Trial Examiner Norwood: Objection overruled.

A. I would say that our cheapest battery cost us about $2.75 to $3.00 to manufacture at that time.

By Mr. Wright:

Q. Just what items of material went into the maunfacture of that battery?

A. The battery case; the separators, wooden separators; the vent covers; the vent plugs; the acid; the lead, of course, both the antimonial lead and the oxides; and then the charging of the battery and the labor.

Q. Then your figure there would include your manufacturing cost rather than just the cost of your materials?

A. Yes, sir.

Q. Can you state what your battery cases cost you 1757 in that period?

A. They ran about 42½ cents apiece.

Q. Do you know what your separators were at that time?

A. Separators were about $6.00 a thousand. There would be approximately about 20 separators in that battery.

Q. At about $6.00 a thousand?

A. That is right.

Q. Do you recall what your covers and vent plugs cost?

A. We always had a set figure for that, we figured approximately 12 cents for a set of covers and vents.

Q. So, then, the separators, 20 of them, at approximately $6.00 a thousand, and your case at 42½ cents, and 12 cents for your covers and vent plugs—

A. (Interposing.) Yes. The acid and charging we always figured at about between, depending on how many batteries were charging on the line, between 6 to 8 cents.

Q. On the charging and acid?

A. Yes.

Q. Do you recall what your antimonial lead was costing you at that time?

A. I tried to find that. This is for 1941?

Q. Yes, sir.

A. I tried to find that in our records, and unfortunately I couldn't, but I believe this will be correct. There was no price change in lead after the war started, other than
1758 that permitted by the Government just recently. Approximately—this is antimonial lead—approximately about between 7 to 7½ cents a pound, and oxides were probably running roughly a penny more per pound.

1759 Q. Do you recall what your selling price was for that battery in 1941?

A. We had various prices on that battery. This is on our cheapest battery?

Q. Yes.

A. I think we discontinued the manufacture of that battery in 1940, but I can give you the one that compared with that. Our selling price of that battery at that time was as low as—well, let's see, I have got to get this right. May I give it for the two batteries because I don't recall when we stopped making one. There was one we were making in 1941—

Q. (Interposing.) Go ahead and give us your prices and then explain your answer so that we will know the product to which it applies.

A. I don't know for certain as to when we stopped manufacturing one type. I tried to locate that too but couldn't, it is so long back. We made a battery that we sold, this real cheap one, at as low at $2.35. We sold it that cheap.

Q. When was that, do you recall?

A. That is what I am not quite clear in my mind on. I don't know whether we were selling it in 1941 or whether we had stopped that in 1941 already, frankly. The next battery which we were selling at that time, which was our cheapest then too, we sold that for $3.75.

Q. That was in 1941?

1760 A: Yes, sir, I am pretty sure of that.

Q. Did you sell this battery that you referred to as being sold at as low as $2.35, at that price in 1940?

A. I believe we did.

Q. Did you incur a loss in selling that battery at that price at that time?

A. Yes, sir.

Q. From what companies have you purchased lead oxides, Mr. Sweet?

A. From the Metals Refining Company, in Hammond,

Indiana, and from the Hammond Lead Company at Hammond, Indiana.

Q. Does that apply over this whole period of time?

A. I believe we have bought our lead from them since we have been in business.

Q. You referred to the highly competitive time during 1938 to 1940, I believe you said?

A. Yes, sir.

Q. In that period, and in times of normal competition, would a saving to you of from five to ten cents per battery in the cost of materials going into those batteries be important in your ability to compete successfully?

Mr. DuBose: The same objection, Your Honor.

Trial Examiner Norwood: Objection overruled.

The Witness: Can I answer that?

Trial Examiner Norwood: Yes.

1761 The Witness: Yes, it would have been very important to us.

By Mr. Wright:

Q. How would a saving of from five to ten cents per battery in the period from 1938 to 1940 or 1941 compare with your net profit on your average battery business?

A. Well, putting it that way, from a financial viewpoint and that angle it wouldn't mean a lot. Let's say our production at that time would be about 12,000—am guessing, and when I say I am guessing, I am pretty sure I am close to right—12,000 cheap batteries, and if there were 12,000 nickels that would be $600.

Q. You mean 12,000 cheap batteries?

A. Yes.

Q. I am asking you now with reference to your entire business?

A. Well, it would mean, if it was ten cents—it would mean as much difference to us at that time as between two to three thousand dollars for the year.

Trial Examiner Norwood: If the materials that went into a single battery were increased by ten cents in cost, how much of an increase would that require in the retail price? It would be much more than ten cents, wouldn't it?

The Witness: Under normal conditions, yes. Before price control that would depend entirely on the dealer

1762 or the wholesaler involved. Some would absorb it. I am talking from actual experience. As a normal

mark-up where you have a ten cent increase in cost you would probably have about a 14 cent increase, on the ratio of 33%, you would have a 14 cent price added to the retail.

By Mr. Wright:

Q. Take 1938 now as a time basis for this. If you were able in 1938, or in a comparable period, to purchase the materials going into your batteries at ten cents less per battery then the present relation of your costs and your competitors' costs, would that have any effect on your business as far as your ability to compete?

Mr. Hinds: I object. The question doesn't include all the possible factors. It seems to me he would have to ask him also whether his competitors would be similarly affected by such a reduction; also whether his price would be determined by his cost or by his competition. A manufacturer's price isn't necessarily determined by his cost. He may have to sell at a loss to meet competition. There are too many false implications in that question.

Trial Examiner Norwood: If he asked him all that wouldn't you object?

Mr. Hinds: Not on that ground. I probably would have other objections, but I wouldn't object on the ground that the question contained false implications.

1763 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: Objection overruled; answer the question.

The Witness: Yes, it would help us considerably. Let me say it this way. It would have helped us if we had had a ten cent lower cost, there is no question about that.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Mr. Hinds: Could we have just a minute or two?

Trial Examiner Norwood: Yes, we will take a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: I do have one other question that I would like to ask the witness, Your Honor.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Is the Federal Storage Battery Company of Chicago a competitor of yours, Mr. Sweet?

A. Yes, although they have had a lot of trouble. They had a fire here sometime back and I understand that they are having their batteries made for them by some other company, or several other companies. I don't know who they all are.

Q. Were they in competition with you on the bat-
1764 teries they made in the period 1936 to 1941?

A. Yes, at that time they were in competition. Today there isn't any competition.

Q. Did you appear in response to a subpoena?

A. Yes.

Q. Prior to the time you received that subpoena was the question of your appearing as a witness in this proceeding—did that ever come to your attention?

A. No, sir.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Hinds.

Q. Mr. Sweet, you say you have purchased your battery oxides from Metals Refining and Hammond, both of Hammond, Indiana?

A. I believe they are both in Hammond.

Q. And from no other producers of oxides?

A. Very honestly I don't know if they are the only two sources. If we have bought lead oxides from any other source it would be such a small amount that it didn't mean anything.

Q. It would be unimportant?

A. That is right.

Q. Did you pay about the same price from those two or did you pay different prices?

A. I believe they were both approximately the
1765 same. There were published prices that were put out by the lead companies on what they called a blue card, they had different colors. Each one sent out a card through the mail and those are the prices we paid.

Q. Did you find any differences between the Metals Refining oxides and the Hammond Company's oxides?

A. You mean in price?

Q. No, in quality or physical characteristics.

A. No, I believe they were equally good.

Trial Examiner Hammond: Was there any difference in price?

The Witness: I don't believe there was any difference in price.

By Mr. Hinds:

Q. Did you find any difference in price between what they were charging and the prices that were available to you from other producers?

A. I don't know. We didn't check that at the time. Those were our sources and we were purchasing from them.

Q. Did you shop around or make any inquiry into purchasing from other possible sources?

A. I didn't, no sir.

Q. Did your company?

A. Yes, I believe Mr. Jaffee, who is my partner, did. My job was selling.

1766 Q. Can you tell us why you purchased almost exclusively, if not exclusively, from those two companies and not from others?

A. Surely. They helped us when we started in the business. Like any other small company we started on a shoestring, and those companies were helpful to us in getting started, and they gave us credit and we felt that in loyalty to them we should not buy from others.

Q. In other words, it was because of the peculiar and exceptional credit facilities—

A. (Interposing.) I wouldn't say "exceptional" credit, but good credit.

Q. But it was credit that was not extended to you by competing producers of oxides?

A. I wouldn't say that they wouldn't be extended to us by others. It so happened that we knew these people and they extended it to us. I wouldn't say that others wouldn't do it because we didn't try.

Q. It was because they had given you, during your company's infancy, satisfactory credit, that out of loyalty you continued to buy from them?

A. Yes, sir.

Q. Did you find that their prices were competitive with others?

A. You mean on oxides?

1767 Q. Yes. Were they as low as the prices of other producers of oxides?

A. I don't know.

Q. Well, would this gratitude have induced you to continue to buy from them had their prices been substantially higher than those of other producers?

A. No. I don't think we would have paid them, frankly, a lot more than we would pay somebody else, because of course that would hurt us tremendously. After all, gratitude can only go so far.

Q. Your gratitude would be effective, other things being equal?

A. That is right. In other words, if you were a salesman and the gentleman next to you were a salesman, if you had helped us we would naturally feel inclined to buy from you rather than from the other party.

Q. Apart from price, can you say how the quality or physical characteristics of what you bought from these two companies compared with the physical characteristics of oxides from other producers?

A. Well, that question will have to be answered this way, sir. Different battery companies use different formulas for oxides. Other companies may not have wanted to use what we were using. However, what we purchased from them was very satisfactory for what we wanted.

1768 Q. In other words, battery oxides are not a uniform and standard commodity, but vary from producer to producer, is that what you mean?

A. That is right. They are fairly uniform. They are so close that it actually doesn't make a lot of difference. But Willard, for example, may have a different type of porosity that they may require in their oxide. We, in our type of manufacture, not having the control over our production that Willard may have, would want a different type of porosity.

Q. You have told us that you sold one battery at as low as $2.35, and that it was sold at a loss.

A. Right.

Q. Can you tell us roughly what that battery cost you at the time you sold it at $2.35, including charging and labor and all the materials that went into it?

A. I will leave overhead out.

Q. All right. I am including the materials, the oxides, the separators, the antimonial lead and the case and the labor and so on.

A. I believe I gave that before, between $2.75 and $3.00. I think I answered that.

Q. And it was at the time it was costing you, exclusive of overhead, from $2.75 to $3.00 that you were selling them for as low as $2.35?

A. Yes, sir.

1769 Q. So that you were taking a loss there on each battery of from 40 cents to 65 cents.

A. That is right, sir.

Q. I assume, then, that when you were charging as low as $2.35 your price was not determined by your cost and what you call a normal mark-up, but that it was determined by competition?

A. Right, sir.

Q. Now you have said that five or ten cents difference in your total costs would be important in enabling you to compete successfully. That didn't apply to the case where your cost, exclusive of overhead, was as high as $3.00, and your selling price was as low as $2.35, did it?

A. Well, as that question was put to me it covered all our batteries, and therefore if we wouldn't have to lower our prices on our better batteries we would have all that extra money thrown in, this extra money that we would save, against the lower price batteries, which would help us.

Q. But you did compete successfully when you were selling some of the batteries at a loss of 65 cents, at the price of $2.35?

A. I don't know how successful we were, but we competed.

Q. You were successfully meeting the competition?

A. Yes, sir.

Q. And you said you could continue to do that

1770 only because you were making a profit on some of your other batteries?

A. Actually we would up a couple of those years in the red because of the low price at which we were selling these cheap batteries.

Q. So that when you say that five or ten cents would be important in competing successfully, you mean in order to meet competition and yet not go into the red; is that what you mean?

A. That is right, sir.

Q. Now isn't it a fact that the principal competition that you were confronted with from other concerns in your business was from concerns in the Chicago district?

A. Pardon me, I didn't follow you there.

Q. You were asked to tell what your principal competition was. Isn't it a fact that most of your competition was from other concerns in the Chicago district?

A. I would say surrounding Chicago district because there are other battery firms such as Wisco in Racine, Wisconsin, which was competition. You are pretty right on what you have said, it was Chicago and vicinity.

Q. Now you have mentioned as materials which go to make up your battery, the case, the separators, the vent covers and vent plugs, the acid, antimonial lead, the lead oxides, and then the charging, which isn't of course so much a material as it is—

1771 A. (Interposing.) That is right.

Q. You didn't say anything about pigments. Do you use pigments in your batteries? You are not familiar with that term?

A. If you are referring to pigments that is part of the oxides, pigments are in oxides if I am not mistaken.

Q. Your understanding is that a pigment is an ingredient of the oxide?

A. I believe so.

Q. Is that term used in your business at all—pigments?

A. It is used by chemical engineers when they are talking between themselves, but not between the laymen.

Q. You never heard the word "pigments" used as synonymous with the term "battery oxides," did you?

A. No, sir, I haven't ever used it in that connection.

Q. And when you refer to battery oxides you say—

Mr. Wright: (Interposing.) I object to this full line, this whole line of testimony. Certainly none of this was brought up on direct examination and it is going very far afield. I realize that counsel for the—

Mr. Hinds: (Interposing.) Counsel heretofore undertook to tell us what a certain term means in the trade. Would you like to go on the stand and have me cross-examine you? I understand you were testifying.

Mr. Wright: Do I understand that counsel is attempting to prove by this witness what the term "lead pig-

1772 ments" means legally?

Trial Examiner Norwood: I think that probably he is asking a question or two bearing on his own connections and his own case, but I see no harm in his doing that. You may cross-examine this witness on it. I will overrule the objection.

By Mr. Hinds:

Q. At any rate, what is known to the chemists as lead oxides so far as used in your business, are called battery oxides?

A. That is right.

Q. They are not called pigments, in your business?

A. Not to my knowledge. I don't know. They are referred to as litharge, as one type; red lead is another—all referring to oxides.

Q. Now you spoke of a normal mark-up. That is merely an ideal or a hope in your business, isn't it? It isn't something that you can use as a basis for quoting your prices? Your prices have to be determined by competition, don't they, not by a normal mark-up, if you want to stay in business?

A. Depending on what condition the country as a whole is in, yes, sir.

Q. Well, during the condition that existed from 1937, when you went into this business, to, say, 1940, your price was determined by competition that you had to meet, wasn't it; not by a normal mark-up from your cost?

1773 A. Yes, price was determined by competition. You can only meet competition so far, though. If you keep on incurring a loss—

Q. (Interposing.) So long as you stay in business, your price is determined by competition and not by a normal mark-up?

A. At that time.

Q. That is what I mean, at that time.

Mr. Hinds: That is all.

Mr. Wood: I have a couple of questions.

Trial Examiner Norwood: All right.

Cross-Examination by Mr. Wood.

Q. On this battery you sold at $2.35, did the size of the order have anything to do with the price you set? I mean was it a big order?

A. From some accounts, from new accounts, yes. From old accounts who already were doing business with us,—let me say fairly, yes, the size would affect the price definitely, the size of the order would affect the price very definitely.

Q. Now on the cost of that battery, I believe you testified that it was between $2.75 and $3.00, is that right?

A. Somewheres in there.

Q. Now aren't you able to place it a little bit closer than that? What was the cost?

A. Unfortunately I can't, because I tried to find
1774 out from the lead companies that we had done business with, the cost of lead at that time. If we could get that, I could tell it to you pretty close.

Q. As a partner in the business, don't you carry in your head the figures that you lose on each battery?

A. Not in '41, I don't go back that far, that is past.

Q. In other words, from the point of view of selling your batteries, do you carry no cost figure in mind closer than a quarter a battery?

A. Now or then?

Q. Now.

A. No, I can come closer today than I can then; I can come within a nickel or probably two or three cents.

Q. We are talking about this battery that sold for $2.35.

A. Yes, sir.

Q. You do not remember the exact cost of that battery?

A. No, sir. Frankly, not because I don't want to. I just can't get the information.

Trial Examiner Norwood: Did it vary at different times?

The Witness: Yes, it would be affected. That is why I say from $2.75 to $3.00, sir, because lead was an open commodity at that time, and sometimes that was bought cheaper and sometimes for more money, depending on the market fluctuation.

1775 Mr. Hinds: Your Honor, I found I overlooked one of my sheets, so I would like to follow Mr. Wood.

Trial Examiner Norwood: All right.

By Mr. Wood:

Q. Do you remember that the price of lead was the same from April to December, 1941?

A. I don't remember, no, sir.

Mr. Wright: I might be able to help counsel out. I believe it was testified to in Washington by a representative of the Bureau of Mines that the price of common pig lead at New York was $5.85 a hundred from the period from April through the end of 1941.

By Mr. Wood:

Q. The point I am trying to make, Mr. Sweet, is this, that you have testified on your direct-examination that a saving in cost of materials of 5 to 10 cents would help you competitively; and you have also testified that on this battery on which you lost money, you didn't even remember the cost closer than a quarter. Now in what sense do you say that 5 or 10 cents a battery would be helpful competitively, as far as price is concerned, when you don't think in terms of closer than a quarter on cost? Do you understand my question?

A. Yes, I understand quite well. I think I do, anyway. That 5 to 10 cents, remember, is a saving on all of our batteries, not only on our cheap batteries, and we did
1776 not run across so much competitive trouble when we started getting into better batteries. They didn't quibble with you for, let's say, a difference of a quarter in price. So that difference there of 5 to 10 cents, when taken over-all, throughout our entire production, would help us offset considerably this loss that we were suffering in the cheaper batteries. When I say I can't give it to you exactly, that it was from $2.75 to $3.00, I frankly can't; but I think we should bear this in mind, that lead was an open commodity at that time and was subject to the fluctuation of the market, and we might buy lead one time at one price and the next time we bought lead it might be at a lower price. So therefore, there would be a difference in the price that we would be paying for our raw material. Therefore, it might run between $2.75 to $3.00; it might go to $2.65 or $3.10.

Q. Your $2.35 price was not determined by the price of the commodity?

A. No, sir, it was determined by competition.

Mr. Wood: That is all.

Cross-Examination by Mr. Hinds.

Q. You say that these costs of your lead fluctuated with the market. Is it a fact that the costs of the lead oxides fluctuated along with the prices of the metallic lead, almost parallel?

1777 A. I would say so.

Q. Now you said that the reason that you bought from either Hammond or Metals Refining and not from

other lead oxide producers was because of your gratitude with respect to their credit accommodations in the early part of your history. What factor determined, at any time, any particular time, whether you bought from Hammond or whether you bought from Metals Refining? Was it price or quality, or what was it?

A. No, sir, each company made a different type of material. Metals Refining, as I recall it, made both litharge and red lead, made them both. And also we bought hard lead, incidentally. In other words, from Metals we bought that, that is the antimonial lead. We bought one type of lead primarily from Hammond, and one type of lead from Metals.

Q. So far as you were concerned, so far as your purchases of these materials was concerned, Hammond and Metals Refining were not in competition with each other?

A. No, as far as we were concerned. I don't know about anybody else.

Q. I am limiting it to you. As far as you were concerned, they were not competitors, because one sold one type of product and the other sold another?

A. That is right, Metals was also selling the same type product as Hammond, and did solicit our business on several times, but we didn't give them that par-
1778 ticular type of business.

Q. Was that also because of factors other than competitive factors, because of some personal relationship?

A. That is right.

Q. So, then, can we safely say or accurately say that so far as concerned products which you bought from Metals Refining Company throughout that period, they were your sole supplier of those materials, with these very unimportant exceptions that you mentioned?

A. Yes.

Q. They were the sole supplier of those materials, and that you did not buy or seek to buy from any others?

A. I wouldn't say we didn't seek to buy. I will say we did not buy from others, that is, as to oxides. We bought pig lead in many places.

Q. I am talking about oxides. Then it is, I assume, true that you did not buy first from Hammond and then from Metals Refining, but that you bought from both at the same time, only different products?

A. Right, sir.

Mr. Hinds: I think that is all. Thank you very much. I hope you keep on buying from Metals.

The Witness: We are very happy to. They have been nice to us.

1779 *Redirect Examination by Mr. Wright.*

Q. You stated, in answer to Mr. Hinds, that you bought one product from Metals Refining and another product from Hammond. Do you know whether the Metals Refining Company was prepared to supply you, if you wished it, with the same type of material that you were buying from Hammond?

Mr. Hinds: I object, because he has already negatived the condition which is implicit in that question. He said that he didn't wish it. So what he would have done if he had wished it would be purely speculative and subjective and therefore objectionable.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. I don't know, no, sir.

By Mr. Wright:

Q. Do you recall which one of the products you bought from Metals Refining and which one from Hammond?

A. No.

Q. I direct your attention to the fact that Commission's Exhibit 831-T, U and V are invoices supplied under subpoena by the Metals Refining Company, showing transactions to the Apex Battery Manufacturing Company in September, October and November, 1941, of a prod-
1780 uct called Plumbage 95-X. What is that product?

A. I believe the Plumbage was the red lead, the positive oxide of a battery. Something just occurred to me in connection with this that this gentleman's questioning reminded me of: As I said before, I am in charge of the selling of our product which, thank God, I don't have to work too hard today to sell, but under normal conditions I was out doing the selling, and my partner's headaches were in the purchasing of the raw materials. I remember some difficulty we got into, but I didn't pay so much at-

tention to it because he handled it successfully, and that was that all of a sudden, several years ago, exactly when I don't know, but Metals Refining stopped, without any warning at all, they stopped oxide sales. I am pretty sure that what I am saying is correct. I think for some reason in connection with the war they went into some other work or were giving the Government the oxides.

Q. That was since the war?

A. I believe it was.

Q. Do you recall now whether the negative oxide or the positive oxide is the one that commands the higher price?

A. I don't know.

Q. You are not familiar enough with that?

A. No.

Q. You are not sure that the Plumbage No. 95-X is the positive?

1781 A. I am quite sure that it is the positive lead, but I don't know whether it commanded a higher price. I am quite sure that Plumbage 95-X was our red lead, our oxide.

Mr. Wright: I have no further questions.

Mr. DuBose: No further questions.

Trial Examiner Norwood: The witness is excused.

(Witness excused.)

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

1782 Trial Examiner Norwood: Call your witness, Mr. Wright: Mr. Baracree, please.

Trial Examiner Norwood: Do you have a subpoena?

The Witness: Is this what you want (indicating)?

Trial Examiner Norwood: Is that name and address correct?

The Witness: Yes.

ARTHUR J. BARACREE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Mr. Hinds: Your name, please?
The Witness: Arthur J. Baracree.
Mr. Hinds: How do you spell it?
The Witness: B-a-r-a-c-r-e-e.
Mr. Hinds: Thank you.

Direct Examination by Mr. Wright.

Q. What is your business connection and address, Mr. Baracree?

A. I am connected with the Am-plus Storage Battery Company, 429 West Superior Street, here in Chicago.

Q. What is your position with that company, sir?

A. President.

Q. What is the business of the Am-plus Storage 1783 Battery Company?

A. We manufacture starting and lighting automobile batteries.

Q. Over how long a period of time has the company been in that business?

A. Twenty-seven years.

Q. What is the normal average output of batteries by that company?

A. Our normal output would be fifty thousand per year.

Q. Fifty thousand per year?

A. Yes.

Q. Can you state over what territory you solicit business?

A. Within a radius of 250 miles of Chicago.

Q. You go as far west as Minneapolis?

A. No.

Q. Do you have travelling salesmen in those areas?

A. Yes.

Q. To what classes of customers do you generally sell?

A. Well, we sell to what we term as distributors. They would possibly be called large dealers by some of our competitors. We take a large dealer and build him up into a distributor.

Q. Do most of your customers resell at retail or do they resell to dealers for resale?

Mr. DuBose: I object on the ground that anything this witness might know would be purely hearsay as to
1784 what his customers do.

Mr. Welch: I object on the second ground that it is leading.

Trial Examiner Norwood: I will overrule the objection and instruct the witness to answer from his own knowledge. Do you know directly or in the due course of business as reported to you by your salesmen.

The Witness: Will you please repeat the question?

Mr. Hinds: Read the question.

(The reporter read the question as follows:

"Q. Do most of your customers resell at retail or do they resell to dealers for resale?")

A. Well, strange to say right at the present time I could answer that question two ways. Am I allowed that latitude?

By Mr. Wright:

Q. Yes, sir.

Trial Examiner Norwood: Yes, sir.

By Mr. Wright:

Q. You can make an answer and then explain it.

A. At the present time I would say most of them are selling at retail.

Q. Are selling at retail?

A. Yes.

Q. Now, what about the period, say, from 1936 to 1941? Would that same situation be true?

1785 A. Some of them would resell.

Q. At retail?

A. Yes.

Q. Now, are your batteries the replacement type?

A. Yes.

Q. Do you manufacture any as original equipment?

A. No.

Q. Do you do any business with fleet operators and industrial concerns?

A. Yes.

Q. On what basis do you do business with those customers?

Mr. DuBose: I object to "on what basis". I do not think that is relevant and competent in this proceeding.

Trial Examiner Norwood: Objection overruled. You can clarify that, if you will.

By Mr. Wright:

Q. Do you lease them or sell them or what is your arrangement with those customers?

A. Well, we do nothing but sell. We do not lease any batteries.

Q. I see. Now, in the market area which you have described what is your principal competition with other battery manufacturers?

A. Our principal competition is mail order source.

Q. Mail order source?

1786 A. Yes.

Q. Does that include—

A. Our chain stores. I would say large chain operators.

Q. Can you name some of those?

A. Well, I would refer to such chain operators as Western Auto Supply Company, Sears Roebuck Company, Montgomery Ward & Company, Solar—wait a minute, I will take that back—Gamble Stores. They use the battery. And there is another firm in Chicago here that operates in adjacent towns, called Western Tire & Supply, I think is the title of the firm.

Q. Do you know from whom those organizations purchase their batteries or do they make them themselves?

Mr. DuBose: I object again on the ground it would be purely hearsay what this witness would know.

Trial Examiner Norwood: Well, he asked him if he knows. Now, you answer yes or no, whether you know or not. Objection overruled.

A. I know who manufactures some of the batteries.

By Mr. Wright:

Q. Will you state, please, the extent of your knowledge?

A. Well, if you had asked me a particular chain I could probably tell you.

Q. Western Auto Supply.

A. Well, their batteries are made by—some of them are made by the National Battery Company, at St. Paul,

1787 Minnesota. Some of them are made by Price in Hamburg, Pennsylvania.

Q. Now, do those batteries originating in Minneapolis and Hamburg, Pennsylvania, come into this market?

A. That, I do not know.

Q. Do you meet the competition—

Mr. Welch: May I ask what the answer to that last question was?

(The reporter read the answer as follows:

"A. That I do not know.")

By Mr. Wright:

Q. Who makes the batteries of the Western Tire & Supply Company? Was that the company you mentioned?

A. Universal Battery Company in Chicago.

Q. Who makes the batteries of Sears Roebuck?

Mr. DuBose: May we have a definite objection to this whole line of questioning? We maintain it is purely irrelevant.

Trial Examiner Norwood: Yes. You can have it on that ground. Answer the question. Will you read the question to the witness?

(The reporter read the question as follows:

"Q. Who makes the batteries of Sears Roebuck?")

A. Globe Union Company.

By Mr. Wright:

Q. Where are they located?

1788 A. Milwaukee, Wisconsin.

Q. Do you, in your market area—say in the period now from 1936 to 1941—have competition from Bowers Battery Company of Reading, Pennsylvania?

A. Yes.

Q. Monarch?

A. Yes.

Q. Where are they located?

A. Bowers Battery Company have a plant in Harvey, Illinois, some time during that period.

Q. Where is Monarch located?

A. Monarch is located in Dayton, Ohio now. They were located in Chicago, then, I believe.

Q. Are you in competition with Willard, Exide and Gran?

A. Yes.

Q. What was the competitive situation in the storage battery industry in your market area in the period from 1936 to 1941?

Mr. DuBose: The same objection, if your Honor please.

Trial Examiner Norwood: Objection overruled.

A. Well, I do not know. Your question is so broad there, it would be rather difficult to answer that specifically.

Q. Well—

A. From what angle?

Q. From the standpoint of price.

A. In the period of 1938 to 1941?

1789 Q. That is right.

A. There were a considerable number of batteries made at low prices and used as, I would say, leaders in chain stores.

Q. Did you find it necessary to meet that competition in that period?

A. We did.

Q. What was your profit margin in that period on the batteries that you sold in meeting that competition?

Mr. Hinds: I object. It has already been indicated they sell some at a loss and make money on others. So the question is completely without any definition. It means nothing unless he first states that he makes the same profit on all. If he states that, why then the question is material; but unless he does that it has to be split up in particular batteries.

Trial Examiner Norwood: I think the question indicates certain transactions there.

Mr. Wright: As a matter of fact the question comprehended the batteries with which he met the competition that he spoke of. He spoke of cheap batteries sold as loss leaders. Then it was stated that he did beat that competition.

I will be glad, after we get this answer, to specify the type of batteries and go into it in further detail.

1790 The Witness: I may interject a thought here,—

Mr. Hinds: What is the ruling?

Trial Examiner Norwood: Wait a minute.

By Mr. Wright:

Q. You confine that then to one battery?

Mr. Hinds: Wait a minute. There is an objection. The Court has not ruled on that.

Trial Examiner Norwood: We are trying to elucidate something here. I am going to rule on it.

By Mr. Wright:

Q. In other words, you had one battery, then, did you, with which you attempt to meet that competition?

A. Yes.

Q. What was that battery, what size?

A. It was a 13 low plate battery in Group 1 size.

Q. Was that a 60 amp-hour or 100 amp-hour, or what was the output?

A. It referred to all over the lot from 50 amperes to 66 by different manufacturers, depending on how they gauge their average.

Q. But it was a 13 plate group 1 automotive battery?

A. That is right.

Q. What was your cost of manufacturing that battery, to which you refer, in 194—

Mr. DuBose: I object.

1791 Mr. Wright: May I complete the question?

Mr. DuBose: Yes, I am sorry.

By Mr. Wright:

Q. —either material cost alone or your material and labor cost.

Mr. DuBose: I withdraw the objection.

A. You asked me for information on 1941 and the following years and we did not make that battery in 1941. I doubt if we made that battery after 1938, that I can recall. I have no figures here to substantiate that. Anything I would say would be a rough guess.

Q. What was your lowest priced battery in 1941?

A. Our lowest priced battery in 1941?

Q. Yes. What construction was that battery? Did you make a 13 plate battery at that time?

A. Yes. We made a 13 plate 75 ampere battery in 1941.

Q. Was that in any way comparable to this battery you were speaking of?

A. No, it was a standard size plate battery.

Mr. DuBose: May the record show that the witness is either reading or refreshing his recollection from a paper?

The Witness: I am referring to a price sheet.

Trial Examiner Norwood: Counsel may examine it.

Mr. DuBose: Yes.

The Witness: They are all here for your inspec-

1792 tion. I just have them here because I cannot remember all these types on here.

By Mr. Wright:

Q. Do you know the cost of that 13 plate 75 ampere battery in 1941?

A. No, I do not.

Q. Now, going back to this battery that you used to meet competition, the 60 amp-hour, you do not have any idea of your costs—I believe you said the last time you sold it was 1938—of manufacturing that battery?

A. That is right, as near as my memory serves me.

Q. Now, Mr. Baracree, in the period in which you manufactured that competitive battery, what was your profit margin on that particular item? Do you know?

A. The profit item on it was never considered. We manufactured that battery because others manufactured it.

Q. Did you make a profit on it in that period?

A. We did not, no.

Q. Did you have a loss in handling that battery?

A. That would be difficult to say because we never made —applied a charge on costs against each individual line of batteries.

For instance, we would run, say, through 120 batteries in one day. The 120 batteries cost us so much labor and a certain amount of labor was apportioned against 1793 every product we made.

Q. Do you have your costs during 1941 for any particular battery?

A. The only costs I have here was material costs.

Q. Material costs?

A. Yes.

Q. Could you give us the material costs on one of your batteries in 1941?

A. No, I can just give you the materials that entered the batteries.

Q. Will you state those, then?

A. Well, 1941, for instance, we were paying 8 cents for positive oxide—negative oxide; 8¼ for positive oxide; $7.21 for 8 per cent pig lead, meaning 8 per cent antimonial pig lead.

Q. That is metallic lead?

A. Yes. $6.91 a hundred for 4 per cent antimonial pig lead; containers—do you want the rest?

Q. Yes, sir.

A. Containers, we were paying for the Group 1 container, 39½ cents. That is 10-B, that is a Group 2 container;

42 cents, and that is 10-E, that is, the long narrow container end to end, 48 cents; coppers, we were paying, per set—meaning three coppers for a battery—11 and a tenth cents apiece or 11 and a tenth cents a set, pardon me;
1794 and for the S-10, 12 and a tenth cent per set. The same would hold for the S-10-E. Lead cans we were paying 8½ a thousand; separators $4.45 a thousand.

Q. How many separators would be used in an ordinary battery?

A. Pardon?

Q. How many separators would be used in an ordinary battery?

A. Well, in the 13 plate battery you use 36, 12 separations to a seal.

Q. In a 15 plate battery?

A. Three times 14, 42.

Q. In 3-vent cans, was that?

A. That is right. Acid was $1.30 a hundred.

Q. About how much acid would be used in a Group 1 battery?

A. It is something I cannot answer. It is mixed with water and I never did know the positive acid content.

Q. Would it be somewhat less than ten cents per battery?

A. Considerably less than that, possibly four cents. Sealing compound, $1.90 a hundred pounds. Please do not ask me how much of that we used.

Q. You used a very small amount of that on each battery?

A. That is right.

Mr. DuBose: What was that?

Mr. Wright: Sealing compound.

The Witness: What we seal the covers in with.

1795 By Mr. Wright:

Q. Now, does that cover the range of materials?

A. Lacquer, $2.70 a gallon; cartons, packing cartons, $2.70 a thousand; number 2 cartons—that is number 1 cartons I just referred to—number 2 cartons, $2.49.

Q. Does that cover the range of materials that go into your production?

A. That is right, sir.

Q. Now, about how many pounds of lead in total are used in your 13 plate batteries?

Mr. DuBose: I object to that unless it is broken down into either lead oxide or other types of lead.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter as follows:

"Q. Now, about how many pounds of lead in total are used in your 13 plate batteries?")

Mr. DuBose: I think it is meaningless.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. How many pounds of lead oxide go into that battery, Mr. Baracree?

A. Into what battery are you referring to?

Q. I am talking about your 13 plate battery that you referred to.

A. That we were manufacturing at that time?

1796 Q. Yes.

A. Not the low competitive 13 plate battery?

Q. Give us as to both of them if you are able.

A. This 13-plate battery I have listed here that I referred to would be now—you asked me the oxide content in that battery?

Q. Yes.

A. Between 8 and 9 pounds.

Q. Now, as to the later, better battery, how many pounds would be in it?

A. The battery we manufacture today, you mean?

Q. Yes.

A. The 15 plate, 100 amperes.

Q. There are two 13 plate batteries?

A. We do not manufacture a 13 plate battery today.

Q. I understood in 1941 you were manufacturing a 13-plate battery?

A. Yes.

Q. And in 1938—

A. In 1941 we did, yes.

Q. All right. Do you know how many pounds of oxide were in that 13 plate battery in 1941?

A. The 13 plate battery in 1941 would be a standard size plate, would be about 9 pounds.

Q. Now, how about that battery you were man-

1797 ufacturing back in 1938 that so-called competitive battery?

A. Six pounds.

Q. Now, how many pounds of oxide go into your present 15 plate battery?

A. 10 pounds.

Q. Now, were you making that 15 plate battery back in that period of 1938 and 1941, too, or a similar product, rather?

A. Yes.

Q. How many pounds of antimonial lead would go into that 15 plate battery that you are now making?

A. A 13 plate battery, did you say?

Q. Well, 13 plate, yes.

A. You can figure it out—say for the questioning you can figure it out 50-50.

Q. About 50-50. In other words, it would be an equal amount of antimonial lead and lead oxides in the battery?

A. Yes.

Q. In the competitive perod of 1936 to 1941, would a saving to you of five cents a battery in material costs have any effect on your competitive ability?

Mr. DuBose: The same objection.

Trial Examiner Norwood: Objection overruled.

A. A difference of five cents you asked whether that would affect our competitive—

Q. Yes. In other words, if your material costs 1798 could have been reduced in a period like the period from 1936 to 1941 by five cents a battery, how would that have affected your ability to compete?

A. Well, I could not say that we could project that into any competitive advantage or disadvantage.

Q. Well, how would that relate to your profit margin in that period of time?

Mr. Hinds: Does this question imply that this same production would not be available to his competitors; available only to this one producer?

Mr. Wright: I am assuming that his competitors would remain the same and that he would have a five cent saving over his principal competitors in material costs.

The Witness: It would not be substantial enough.

Mr. Welch: May I ask Mr. Wright a question? You mean a saving to him alone that the other competitors do not have?

Trial Examiner Norwood: Yes, that is what he said.

Mr. Welch: All right.

A. I do not believe it would be substantial enough, Mr. Wright to affect our selling price.

By Mr. Wright:

Q. Now, I believe you stated before that on your cheaper batteries in that period you not only made no profit; you suffered a loss?

1799 A. Yes.

Mr. DuBose: I object to that. I do not think that was his testimony. His testimony was there is no way in his mind to allocate whether or not he could charge a loss to this so-called loss leader competition.

Trial Examiner Norwood: Just what made you say that?

Mr. Wright: I believe we should question the witness further about what his testimony was.

Mr. DuBose: I object to the question upon the ground that the assumption had no basis in the testimony.

Mr. Welch: It is my recollection that he said he made the batteries to meet a competitive situation. The profit and loss was not the primary consideration.

Mr. DuBose: That is right.

Mr. Hinds: Yes, and then he said he made around twenty batteries in a given day and they would figure it all in and see whether they made a profit or loss.

Trial Examiner Norwood: You might ask the witness what he said.

The Witness: The remark that this last gentleman started was what I said, that we had no way of breaking down a profit and loss on any particular line of batteries because of the fact that we made a line of 120 batteries a day.

We would not know whether 20 of them cost us so
1800 and twenty more cost us so much. We knew that the 120 cost us $50; divided by 120, that was our cost.

By Mr. Wright:

Q. That was your cost per battery, allocated that way?

A. Yes.

Q. Did you, in that period, have a selling price of any of your line of 120 batteries which was less than the cost per battery that you allocated that way?

A. (No response.)

Q. What was your lowest selling price on this competitive battery during that period?

A. Our lowest selling price, as I recall, was $2.45.

Q. Well, now, was your unit cost of batteries, computed the way you have stated it, ever lower than $2.45 a battery?

A. I would not be clear enough on that to answer it without seeing the figures.

Q. Well, now, when was your lowest price of $2.45? Can you give us a date on that?

A. In 1938.

Q. In 1938?

A. That was the last that I can recall.

Q. What was your lowest price that you can recall in 1940?

A. $3.95.

Q. How about 1941?

A. $3.95.

1801 Q. I see. Can you state what your margin was over costs on that battery that you sold for $3.95 in 1941?

Mr. DuBose: I object to the question unless cost is defined. In other words, we have been talking about material costs, but we have not been talking about labor costs or overhead or sales costs or anything like that.

Mr. Wright: Let's find out what the witness knows.

The Witness: Well, I would have to—if you want costs of a product I would have to have something definite on which to answer your question.

For instance, my production cost is one figure. My total cost naturally is another figure, and the total cost is overhead and advertising, if any, and sales expense.

By Mr. Wright:

Q. What was that battery, that $3.95 battery? Was that that 13 plate?

A. At that time we were fortunate if we had a gross profit of 20 per cent.

Q. 20 per cent?

A. It would range between 20 and 25 per cent, determined in a large measure by how the help worked during that particular period.

Q. Now, what do you mean by gross profit?

A. Gross profit means before our rent and advertising and sales expense and my salary.

1802 Q. Shipping expense?

A. Shipping expense is always charged up in costs.

Q. I see. Advertising and sales expense and salaries and executive overhead came out of that 20 per cent, 20 to 25 per cent?

A. Yes.

Q. So that then your net profit margin was probably less than 10 per cent?

A. Considerably.
Q. Considerably less than 10 per cent?
A. Yes.
Q. So that on a battery that you sold for $3.95, if your net was less than 10 per cent, would it then have been less than 39 cents per battery? Is that correct?
A. That is right.
Q. Could it have been less than 25 cents per battery?
A. (No response.)
Q. Was it ever in that period that you recall?
Mr. DuBose: Are you speaking of 1941, Mr. Wright?
Mr. Wright: The period 1936 to 1941, if he can recall that time when it was below 25 cents.
Mr. DuBose: Well, I object to that upon the ground that the question, to say the least, is ambiguous. We have been talking about the loss in 1938 when it sold for $2.45 and now he is talking about this $3.95 battery which
1803 may or may not have been sold for that price during that whole period. I do not know.
Mr. Wright: Well, I will amend the question then to make it apply to the period 1940 to 1941 since those were the years he testified it sold for $3.95.
The Witness: May I have the question again?
Trial Examiner Norwood: Can't you restate that question?
Mr. Wright: Yes. I believe that would be simpler, to restate it.

By Mr. Wright:

Q. On that basis then, of something less than 10 per cent, could your net profit have been less than 25 cents per battery on that $3.95 battery during 1940 and 1941?
A. At times during the period it could have been and at other times it could have been more. I am talking on an over-all picture for the year.
Q. For your entire range of batteries?
A. That is right. For me to remember back monthly, I could not say.
Q. Do you make the same profit margins on all the batteries that you offer for sale?
A. No.
Q. Are some of them considerably lower than others or how do they vary? Let me ask you that.
1804 A. Well, we take a greater markup on types that are more troublesome to make and we have to stop

the lines and make fewer batteries on that particular day. Does that answer your question?

Q. Yes. Now, are some batteries priced at a lower margin in that period because of competitive conditions?

Mr. Welch: Objection, your Honor. The question is leading.

Mr. DuBose: I want to object upon the ground it is ambiguous: a lower margin. I do not know what he is referring to there. Lower than what?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Yes. Now, are some batteries priced at a lower margin in that period because of competitive conditions?")

Trial Examiner Norwood: I do not think that it is leading. Objection overruled.

Mr. DuBose: Both objections?

Trial Examiner Norwood: Yes.

A. Yes, they are.

By Mr. Wright:

Q. In other words, you operate at a closer margin on some batteries than on others?

A. We operate on a closer margin on all Group 1 1805 batteries, because that constitutes 85 per cent of the line.

Q. You have a closer margin on those?

A. Yes.

Q. Because of competition?

A. No, because it constitutes a larger proportion of the line.

Mr. Wright: I see. I have no further questions.

Trial Examiner Norwood: Cross examine.

Mr. DuBose: May we have a few minutes?

Trial Examiner Norwood: We will take a three-minute recess.

Mr. Hinds: I move to strike out all the testimony of this witness inasmuch as it has not been connected with this case or with any other respondents.

It does not appear that he purchased any of these oxides or any products from any of these respondents. Therefore there is not even the remotest connection between this testimony and any issue in this case.

Mr. Welch: I join in the motion.

Mr. Wright: May I say, in response to that, that there have been identified but not yet offered in evidence a great

batch of invoices which were submitted by the National Lead Company under subpoena, and due to technical difficulties involved in a mass of those invoices, I have not yet been prepared to offer them all in evidence, but I
1806 assure your Honor when those invoices are offered they will sufficiently identify this witness with the respondents so that—

Mr. Hinds: I suppose we will have the burden of bringing this witness back to Chicago for examination and we will then be enabled to see whether we want to cross examine him. At the present moment I have no basis. I do not know whether I want to cross examine. I do not know whether my client is involved.

That, by the way, was the difficulty this morning. It was not until recess when I had an off-the-record talk with my opponent that I had the remotest idea what the pertinency of the evidence was.

By the way, I would like to have Mr. Sweet brought back here. I do not think we should be put to that burden. You will remember that I have been trying for many, many sessions to find out from my opponent what this case is about, which sales he claims not to be discriminatory.

Now he is bringing in witnesses in connection with certain sales. He has not even got the evidence of these sales in the record as yet. He says he has some documents identified. They are not even yet in evidence, and especially has he not indicated which one of them he claims to be discriminatory. So how can we successfully or intelligently cross examine these witnesses?

Mr. Wright: Your Honor, in partial answer at
1807 least to Mr. Hinds, I want to call his attention to the fact that the Apex Battery Manufacturing Company —Mr. Sweet, the witness to whom he last referred—or, rather, that invoices submitted by the Glidden Company under subpoena duces tecum and which were admitted into evidence as Commission's Exhibit 831-T, U and V show transactions of sales of lead pigments by Glidden to the Apex Battery Manufacturing Company.

Now, that material is already in evidence.

Mr. Hinds: What objection was there then to your telling us this morning? What was the purpose of the testimony? We are not clairvoyants. We are not magicians. We cannot possibly know what the purpose of the examination is unless counsel aids us.

1808 Now we are in the embarrassing position of having to ask the Court to issue a subpoena so that we can bring this gentleman back here during this session. Otherwise we will have to either subpoena him from Chicago to wherever we are going to be sitting on our case. It seems to me unfair.

Trial Examiner Norwood: I will say this: The relevancy of this material here is apparent to me without examining any invoices.

Now, those invoices may throw some further light on it. I do not know. But, in any view of the case, if it appears to me just and fair or in the interest of respondents to bring some other witnesses up here or to recall some of their witnesses, I assure you, you may do so and you will have ample time to do so and I will not take any more time to examine him at some future time when we have further information and when it will be of greater advantage to you than it will to cross examine him now.

Mr. Wright: Before your Honor rules on this pending motion—

Mr. Hinds: Are we going to sit here in Chicago until it comes time for our rebuttal? I would like to have the opportunity while we are here in Chicago.

Trial Examiner Norwood: I do not see how you can do that.

Mr. Hinds: All of us counsel—we may be peculi-
1809 arly dense—in good faith we tried, to satisfy ourselves, to guess what the purpose of this proof was this morning and we all thought it was a conspiracy charge. We all said it cannot possibly be on Count 2.

Mr. Wright: It was stated in answer to an objection to that was relevant to Count 2.

Trial Examiner Norwood: It certainly was relevant to show the effects in this industry of lead prices. It certainly appeared to me to be part of the necessary information that had to be received under this complaint, and I will say to the counsel that all of the evidence cannot be produced at one time. We have to take it witness by witness, and you will have ample time to do so.

Mr. Hinds: It would be very helpful—and one of the Commissioners said: "This is not a punishment or persecution but it is an effort to get at facts"—if counsel would help us a little more and tell us what the purpose, what the logic, the pertinency of the testimony is.

Now, he refuses, apparently, to tell us from which respondents this witness buys his supplies. I do not know whether I should cross examine him or not. If he does not buy his goods from Metals Refining Company perhaps I will have no reason to cross examine him.

I do not like to have to speculate here nor do I like to have to take a lot of cross examination which may
1810 prove to be a waste of all of our time.

Mr. Wright: Before your Honor rules on this pending motion, I would like to ask the witness two or three more questions which would, in a large part, satisfy Mr. Hinds, although certainly he could bring that same matter out in a similar short time by asking one question on cross examination. But as to the matter of the issues, certainly Mr. Hinds and counsel generally, in this matter, are able lawyers and there is nothing obscure about the complaint and the issues that were drawn by the complaint and the answers.

Now, with reference to all of this testimony that has been taken today, and which we will continue to take, I am not at this point ready to make a formal statement about the issues in the case but I will say that it is the contention of counsel for the Commission that the prices set up for litharge and red lead by the respondents, as we contend by collusion, are unfair and discriminatory; that they discriminate against the small purchaser on the card prices in favor of the carload buyer; that they discriminate against the buyer who is located freightwise close to the factories of the respondents, and in favor of those who are located at a distance.

Now, I do not think there has ever been any question or doubt in the minds of counsel that those things were issue in this case.

1811 Mr. Hinds: I would like to ask whether it is his contention that these card prices represent sales or are in accordance with actual sales so that you thereby discern and allege discrimination under the Robinson-Patman Act. If it is not sales under that certainly it cannot be discriminatory.

Mr. Wright: Mr. Hinds, we have already in the record a great many invoices from the Metals Refining Company, which show on their face actual transactions of sale and delivery of these products to customers.

Mr. Hinds: Obviously. I say do you contend that the prices on the cards are concurrent with actual sales?

Mr. Wright: I do not think I should be required to answer that question.

Mr. Hinds: Then obviously all that counsel has said is that certain actual sales by Metals Refining Company show a discrimination with what? With some prices on some cards, quotations. Counsel says he does not think he should be required to say whether or not he contends that the latter involved any actual sales. So that makes it even clearer than before that we do not know with what issue we are being confronted.

Certainly the Robinson-Patman Act does not denounce a difference between a price charged to Mr. A and a quotation put on a card under which there are no sales.

Mr. Wright: Well, if that came within the Robin-
1812 son-Patman Act there cannot be any issue.

Mr. Hinds: I am trying to find out if there is any issue.

Trial Examiner Norwood: You contend these cards are in issue that are in evidence now?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Do you contend there is no evidence in there as to what these prices were?

Mr. Hinds: We have already made it clear that on many of these cards there have been no sales.

Trial Examiner Norwood: That is right.

Mr. Hinds: The Commission is the one that is making out a case. We want to know which pair of sales he claims are, as between one and the other, discriminatory. Now he tells us that one of the pair—I know only for the first time this afternoon that one of the pair will be certain sales made by Metals Refining to this Mr. Sweet's company.

Now I ask, what is the other of the pair? And all I can get from counsel is a refusal to tell me whether or not these prices on the cards correspond to any actual sales, and if so, to whom. We do not know whether they would be the same type of customer. We do not know anything about them.

That is why I did not intelligently cross-examine Mr. Sweet. I find now there are many questions I should have asked him.

1813 Now I cannot intelligently cross-examine this gentleman. I do not even know whether he is one of our customers.

Trial Examiner Norwood: Didn't you hear his direct examination?

Mr. Hinds: What is that, sir?

Trial Examiner Norwood: Didn't you hear the direct examination of this witness?

Mr. Hinds: I thought I did and I asked my colleague here.

Trial Examiner Norwood: You can cross-examine him on that.

Mr. Hinds: Not knowing what the issue is, whether it would affect my client—

Mr. Wright: There is a motion pending, I believe.

Trial Examiner Norwood: I think that the pleadings are in. At least it should be clear to counsel, and I think that counsel, who is a layman here in the development of his case, has made sufficient explanation at this time.

Mr. Hinds: If this were a court of law we would file a bill of particulars here. We would clarify these issues because, to my mind, it is very oppressive to have to guess whether a certain witness' testimony affects our clients, and if so, in what respect.

Trial Examiner Norwood: Well, I think you are
1814 going to have to deal with this evidence as it comes out, whether it affects you or not.

Mr. Hinds: I enter my most urgent and sincere protest. I think the whole thing is unfair. I will have to cross-examine him limping along as well as I can without the aid of counsel for enlightenment.

Mr. Wright: Before your Honor rules on the motion that was made by Mr. DuBose to strike the testimony of this witness, I would like to ask him one or two more questions.

Trial Examiner Norwood: Go right ahead.

Direct Examination (Continued) by Mr. Wright.

Q. Mr. Baracree, from what company or companies does your concern purchase lead oxide?

A. National Lead Company.

Q. You purchase exclusively from the National Lead Company?

A. Pig lead and oxide.

Q. On what price basis do you purchase? Are you a carload purchaser?

A. Yes.

Q. Do you know how the price is computed? Is it a differential over the pig lead price?

A. Yes.

Q. Do you know what that differential is?

Mr. DuBose: I object upon the grounds the com-
1815 plaint was certified. The amended complaint was served in May of 1946 and he apparently is asking about the present time, which admittedly is under abnormal conditions.

Mr. Wright: It is a technical objection, your Honor. I am willing to reframe the question. I was fully intending to carry the witness back over it.

Trial Examiner Norwood: Question withdrawn.

Mr. DuBose: All I meant was to have an accurate question and accurate answer.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Do you know what the differential over the pig lead price was used in computing your purchases during 1945?

A. Well, I do not recall what the positive differential was. These figures will not tell me here because I have antimonial lead, but the antimonial figure I do not know. I haven't got the price on antimonial lead.

Q. Do I understand your testimony is that you do not know what that differential was?

A. No, I do not. I did know at one time definitely, but I do not know now.

Mr. Wright: No further examination.

Mr. DuBose: May we have our recess?

Trial Examiner Norwood: Motion is denied. We will have a five-minute recess.

1816 (Whereupon a brief recess was taken.)

Trial Examiner Norwood: Proceed. Cross-examine.

Cross-Examination by Mr. DuBose.

Q. Mr. Baracree, I believe you stated that among your competitors were Sears Roebuck, Montgomery Ward and certain other large chains, shall we say?

A. I should probably make a broader statement than that: among the competitors of our dealers or our outlets: they would not be direct competitors with us, no.

Q. In other words, that is an indirect sort of competition that your dealers get primarily from Sears Roebuck and Montgomery Ward?

A. That is right.

Q. Now, Mr. Baracree, how long have you been in the storage battery business?

A. We will take eleven away from forty-six—thirty-five years.

Q. About thirty-five years?

A. That is right.

Q. And over the course of the years, to your knowledge, have oxides been improved by the producers of oxides?

A. Definitely.

Q. And in your selection among the possible producers from whom you buy do you look at the quality of the 1817 oxides produced by particular producers?

A. Without a doubt.

Q. And in selecting National Lead to purchase from, and lead oxides, do you take into consideration the technical help or advice that you might get from National Lead?

A. Positively.

By Mr. Wood:

Q. Are the battery oxides offered by National Lead different from the battery oxides offered by Eagle-Picher?

A. Yes.

Q. In what way are they different; just generally?

A. The manner in which we handle them in our process of manufacturing.

Q. And you prefer the National Lead?

A. We do.

Q. Have you discussed the relative merits with other battery manufacturers who buy from Eagle-Picher?

A. We have.

Q. And there is a difference of opinion in the industry as to which is the best?

A. Yes.

Mr. Wood: That is all.

Redirect Examination by Mr. Wright.

Q. Mr. Baracree, do you know whether Eagle-
1818 Picher Company and Metals Refining Company offer technical help and assistance to battery manufacturers in connection with selling them oxides?

A. Yes.

Q. Is that comparable help and assistance to that offered by the National Lead Company?

A. That I could not say because we have never drawn on their resources.

Q. But you know that such facilities are available from the other suppliers of lead oxides?

A. I do, yes.

Q. You spoke of the National oxides being your preference. Can you enumerate the differences between the oxides of National and those of Eagle-Picher?

A. I am not a technical man even though I have been in the business thirty-five years. I suppose thirty-four and three-quarters of those years have been spent in selling and I am not a technical man.

Our main reason, I would say, for using National Lead oxides has been due to the fact that I experienced, in the use of this particular oxide, that it has placed us among one of possibly six of the leading manufacturers in the country as to the type of battery or quality of battery that we have been able to produce from those oxides.

1819 Q. In other words, you believe there may be differences from the Eagle-Picher oxides but you do not know what those differences are?

A. Those differences are only due to opinions I have formed from the use of their particular product, and from the tests I have seen of batteries made with other products.

Q. In other words, you don't know of any physical differences in the products themselves?

A. Other than the workability of them in the factory.

Q. You know of no chemical differences or differences in—

A. (Interposing.) In the present-day oxides there is considerable difference.

Q. In normal times?

A. Well, that would have nothing to do with the times, the oxides we are using now. National Lead has recently perfected a plate that they call—I don't know just what the type of that is called now—it is what we call a dehydrated plate; and we save several man-hours in the handling of it.

Q. Did you say that had been developed by you?

A. No, that has been developed by the National Lead Laboratories in Brooklyn.

Q. Is that a method of manufacturing a plate, or is that an oxide?

A. That is an oxide that we use in manufacturing the plate.

Q. I see. Do you know whether National Lead
1820 Company makes a large variety of different oxides suited to different processes?

A. Yes.

Q. Do you know whether or not Eagle-Picher and Metals Refining also have a variety of oxide?

A. I assume they do.

Q. And you prefer certain of the oxides made by National Lead Company over certain other oxides that are made by them?

A. Well, some of the oxides made by the National Lead, for instance, would only be adaptable for paint uses or heavy duty batteries, let us say for submarine batteries, heavy duty batteries, truck batteries, but for a starting and lighting battery, which is the only line we make, their particular oxide is more adaptable for what we attempt to accomplish of a technical nature in the battery we produce.

Mr. Wright: No further questions.

Mr. Hinds: I have some questions.

Trial Examiner Norwood: Go ahead.

Recross Examination by Mr. Hinds.

Q. On direct examination you said that Metals Refining Company offers technical assistance to battery manufacturers. Has it offered such technical assistance to your company?

A. Yes.

Q. You say you have not purchased any oxides from Metals Refining Company, is that right?

1821 A. That is right.

Q. What is the reason for excluding their oxides in your purchases?

A. I wouldn't say that "excluding" is the word. I don't exclude them.

Q. What is the reason why you have not purchased their oxides before but have purchased them from National Lead?

A. Because, as previously stated, our experience has been so satisfactory with National Lead, and we have no laboratory of our own to test the relative merits of the Metals Refining oxides with other oxides.

Q. Has it been a question of relative price?

A. No.

Q. In other words, entirely apart from price competition your company has decided to buy National Lead's oxides and not Metals Refining Company's oxides, and other people's oxides?

A. That is right.

Q. Have you at any time considered the question of purchasing oxides from Metals Refining?

A. No.

Q. So that so far as your concern goes, such competition or alleged lack of competition as there may be between Metals Refining Company and National Lead has not been in any way a factor in your selection of the oxides for your use?

A. No.

1822 Q. You have told us of some of the materials that you use in your batteries. Do you use pigments?

A. No.

Mr. Hinds: That is all.

Mr. Wood: I have one more question.

Recross Examination by Mr. Wood.

Q. Does the National Lead Company put out a single leady oxide that is adapted to be used on both plates of a battery, that is on the positive and negative plates?

A. Not to my knowledge.

Q. Do they put out different oxides for the different plates?

A. That is right.

Q. Has there been any change in National Lead's negative oxide during the past few years?

A. Not during the past few years.

Q. Has there been an improvement, let us say since 1936?

A. In the negative oxide?

Q. Yes.

A. I don't believe so since 1936, no.

Q. There have been changes, though, in the oxides in general?

A. In the positive oxides, but not in the negative.

Q. And is your understanding that Eagle-Picher's recommendations to battery manufacturers are different from those of National?

1823 A. That I couldn't say.

Q. You aren't familiar with Eagle-Picher's recommendations?

A. That is right.

Q. Have you ever tested any of Eagle-Picher's products?

A. Years ago.

Q. Just years ago?

A. That is right.

Mr. Wood: That is all.

Mr. Hinds: I move to strike out the entire testimony of this witness on the same grounds of the motion which Your Honor denied, but now with a much more unmistakable factual basis to support my motion, namely that he has not only failed to show that pigments are used by this battery producer, as was the case with the other two witnesses, but here the witness has definitely stated that his company does not use pigments at all in their battery production, and this case has to do solely with pigments.

Mr. Wright: May I ask the witness one question before Your Honor rules on that?

Trial Examiner Norwood: Yes.

Mr. Wright: Do you purchase litharge from the National Lead Company?

The Witness: No.

Mr. Wright: Do you know what the negative oxide that you purchase from National Lead is composed of?

1824 The Witness: I have always assumed that it was a mixture of red lead and litharge.

Mr. Wright: Are both the negative and positive oxides that you have been referring to composed wholly or substantially of red lead and litharge?

The Witness: I understand that that is the base.

Mr. Wright: Your Honor, on the basis of the statements that the witness has just made, that the oxides that he purchases are composed of litharge and red lead, it seems obvious that Mr. Hind's motion should be denied. He is resting on the technical use of the term "pigments", which as I pointed out earlier in the day, in answer to the same objection, is a term that the respondents themselves have used constantly to describe these products generally—lead pigments—and the term is defined in the complaint specifically to include litharge and red lead.

Trial Examiner Norwood: The motion is denied. Have you another witness for tonight?

Mr. Wright: No, sir. I want on redirect to ask one question of the witness.

Redirect Examination by Mr. Wright.

Q. You stated that price was not a factor in your purchase of oxides from the National Lead Company.

A. I don't believe I made that statement.

1825 Q. What was your statement?

Mr. Hinds: That price was not a factor in his not buying from Metals Refining—that is what he said.

By Mr. Wright:

Q. Have you ever been offered a better price by either Metals Refining Company or Eagle-Picher for comparable oxides, than you were offered by National Lead in the period from 1936 to date?

Mr. Wood: I object to that question on the ground that he is putting the statement in the mouth of the witness that the oxides are comparable, whereas the witness has testified that the oxides were decidedly different.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: The objection is overruled. If those offers were made to you on comparable products, you may answer.

The Witness: The question is was I ever offered a better price—

By Mr. Wright:

Q. (Interposing.): Yes, sir.

A. No.

Q. If you were offered, let us say, negative oxides, by the Eagle-Picher Company or the Glidden Company, at a half cent per pound cheaper than you could buy them

1826 from the National Lead Company, would you do business with either Eagle-Picher or Glidden?

Mr. DuBose: I object on the ground that it is purely hypothetical, and argumentative.

Mr. Hinds: I object on the further ground that these respondents can't be condemned by testimony as to what a certain purchaser would do under certain circumstances not shown to exist. We can't be condemned by subjective speculation as to what people would do.

Mr. Wright: The cross examination by Mr. Hinds along

this line was very obviously for the purpose of bringing out from the witness that price was not a factor in his purchase of these products.

Mr. Hinds: Oh, no.

Mr. Wright: And the questions were very pointed to that effect; and I am just now testing the witness to find out whether price would be a factor.

Mr. Hinds: My cross examination had for its purpose, and was successful in said purpose, the showing that in not buying from Metals Refining Company price was not a factor.

Trial Examiner Norwood: I will overrule the objection and ask the witness to answer the question. Do you want it read?

The Witness: Yes.

1827 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

The Witness: We naturally would do business with them if the oxides they were able to produce for us would meet with the specifications we had found satisfactory in our product as produced by the National Lead Company.

Mr. Wright: No further questions.

Mr. Hinds: This is cross on the further questions of Government counsel.

Recross Examination by Mr. Hinds.

Q. You say that in no instance the prices offered you by the Metals Refining have been lower than those offered to you by National Lead?

A. I don't recall Metals Refining ever having quoted us a price.

Q. Perhaps I misunderstood your testimony. I understood counsel to ask you whether or not Metals Refining had offered you any prices lower, and you said no. Did you mean they hadn't offered you any prices at all?

A. That is right.

Mr. Hinds: That is all.

Mr. Wood: I have just one more question.

Recross Examination by Mr. Wood.

1828 Q. Do you know of any source, other than National Lead Company, for the particular lead oxides you purchase from National Lead Company?

A. I do not.

Mr. Wood: That is all.

Recross Examination by Mr. Hinds.

Q. I think you said that Metals Refining did offer you technical services?

A. Yes.

Q. Well, did they make you that offer unaccompanied by any solicitation of your business?

A. That offer was made by a chemist and not a salesman.

Q. I see. But you say they did not ever offer to sell you any oxides?

A. They did not offer us the services; they merely told me that the services were available.

Trial Examiner Norwood: In case you became a customer?

The Witness: That would be assumed.

By Mr. Hinds:

Q. Did they ever solicit business from you?

A. Yes.

Q. Did they name the price at which they would sell?

A. No.

1829 Mr. Hinds: That is all.

Mr. DuBose: No further questions.

Mr. Wright: No further questions.

Trial Examiner Norwood: You may be excused.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will recess until ten o'clock tomorrow morning.

(Whereupon, at 4:25 p.m., November 13, 1946, the hearing in the above-entitled matter was recessed until 10:00 a.m., November 14, 1946.)